Commission of Inquiry
into the
Sponsorship Program
& Advertising Activities

Restoring Accountability

Research Studies
Volume 3

Linkages: Responsibilities and Accountabilities

Commission of Inquiry
into the
Sponsorship Program
& Advertising Activities

Restoring Accountability

Research Studies
Volume 3

Linkages: Responsibilities and Accountabilities

Restoring Accountability
Research Studies: Volume 3
Linkages: Responsibilities and Accountabilities

© Her Majesty the Queen in Right of Canada,
represented by the Minister of Public Works and
Government Services, 2006

Cat. No: CP32-87/3-2006E
ISBN: 0-660-19583-6

Available through your local bookseller or through
Publishing and Depository Services
Public Works and Government Services Canada
Ottawa, Ontario
KIA OS5

Telephone: (613) 941-5995
Orders only: 1 800 635-7943
Fax: (613) 954-5779 or 1 800 565-7757

Internet: http://publications.gc.ca

Ce document est également publié en français sous le titre
Rétablir l'imputabilité
Études : volume 3
Liens : responsabilité et reddition de comptes

106-02342/

CONTENTS

INTRODUCTION 1

Donald Savoie

The Papers 4

THE ROLE OF THE CLERK OF THE PRIVY COUNCIL

S.L. Sutherland

1 Introduction 21

2 Terms of Reference 24

3 Canada: The Clerk of the Privy Council 25

- 3.1 The Clerk Role: Guardian of the Integrity of the Cabinet Decision-making System 25
- 3.2 Secretary to Cabinet 26
- 3.3 Deputy Minister to the Prime Minister 30
  - 3.3.1 The Organization of the Privy Council Office 30
  - 3.3.2 The Advice Function 32
- 3.4 Canadian Head Role 33
  - 3.4.1 Creation of the Title 33
  - 3.4.2 Clerk's Role in Deputy Head Appointments 36
  - 3.4.3 Other Senior Personnel Duties 38
  - 3.4.4 Privy Council and Subordinate Legislation 40

4 The UK Cabinet Office and Cabinet Secretariat 41

- 4.1 Minister of the Civil Service 42
- 4.2 Cabinet Secretariat 43
- 4.3 Cabinet Office 44
- 4.4 Head Role 46
- 4.5 The British Privy Council Office 48

5 Evaluative Components of the Canadian Clerk Role 49

- 5.1 How Have Successive Clerks Played or Understood Their Roles? 49
  - 5.1.1 Annual Reports as "Head" 49
  - 5.1.2 Clerks' Own Publications on Their Role 54
  - 5.1.3 "Quality" Journalistic Judgments 57

5.2 How Has the Clerk's Role Changed over Time? 63
  5.2.1 Clerk as Prime Minister's Mediator 64
  5.2.2 Government Is Judgmental and Political 65
  5.2.3 Can the Clerk Cope with "Invisible Problems"? 66
  5.2.4 The Media Make the Message 68
  5.2.5 Clerks' Media Profiles over Time 69
  5.2.6 Newer Developments Such as Horizontality and New Public Management (NPM) 71
  5.2.7 What Can Be Done to Ensure the "Chain of Accountability"? 77
  5.2.8 The Many Hands Problem 77
  5.2.9 The Accounting Officer Reform in Canada 81

6 Canada and UK Cabinet Offices Compared and Contrasted— Can One Import Reform? 83

6.1 Prime Minister Prerogative Powers 83
6.2 Special Advisers in the UK: Bringing Policy to Administration 85
6.3 Permanent Private Secretaries to Ministers 88
6.4 Terms of Office 88
6.5 The Political Minefields of Imported Reforms 90

7 Recommendations 92

7.1 Theme: Modernize the Canadian Clerk's Role 92
7.2 Theme: Buttress the Integrity of the Centre 98

8 Closing Thoughts 102

Appendix A:
Periods in Office for Secretaries to Cabinet in Canada, UK and Australia 103

Appendix B:
The U.K. Committee on Standards in Public Life 104

RESPONSIBILITY, ACCOUNTABILITY AND THE ROLE OF DEPUTY MINISTERS IN THE GOVERNMENT OF CANADA 115
James Ross Hurley

1 Purpose and Scope 115

2 The Fundamental Principles Underlying Responsible Parliamentary Government in Canada 116

3 The Evolving Nature of Government in Canada 119

4 Defining Terms 124

5 Political Actors Versus Professional Actors 128

6 The Multiple Responsibilities and Accountabilities of Deputy Ministers 132

7 Mechanisms for Political and Professional Financial Accountability 135

8 The British Accounting Officers 140

9 Comparing the British and Canadian Practices 145

10 Conclusion 148

THE RESPECTIVE RESPONSIBILITIES AND ACCOUNTABILITIES OF MINISTERS AND PUBLIC SERVANTS: A STUDY OF THE BRITISH ACCOUNTING OFFICER SYSTEM AND ITS RELEVANCE FOR CANADA 157

C.E.S (Ned) Franks

1 The British Accounting Officer System 157

- 1.1 British Accounting Officers 157
  - 1.1.1 The Roles and Responsibilities of Accounting Officers 158
  - 1.1.2 Regularity, Propriety and Value for Money 159
  - 1.1.3 Accounting Officers for Horizontal (Joined-Up) Initiatives 162
  - 1.1.4 The Variety and Number of British Accounting Officers 163
  - 1.1.5 The Permanent Secretaries 165
- 1.2 Ministerial Directions: The Process for Overruling British Accounting Officers 168
  - 1.2.1 The Process for Ministerial Directions 169
  - 1.2.2 Preservation of Confidentiality 171
  - 1.2.3 Frequency and Nature of Ministerial Directions 173
- 1.3 The Role of the British Treasury 173
- 1.4 The British Public Accounts Committee 175

2 Britain and Canada Compared 180

- 2.1 Permanent Secretaries and Deputy Ministers 180
- 2.2 Regularity, Propriety and Value for Money 183

2.3 Ministerial Directions (Overrulings) 184
2.4 Treasury and Treasury Board 184
2.5 The Role of the Auditor General 185
2.6 The Public Accounts Committees 185
2.7 Conclusions: Similar Outside, Different Inside 186

3 The Arguments Against the Accounting Officer System 189

3.1 Misunderstandings of the British System 190
3.2 Parliament Does not Want to Make the Distinction Between the Responsibilities and Accountabilities of Ministers and Deputy Ministers that the Accounting Officer System Requires 193
3.3 The Canadian Parliament and Public Accounts Committee Are Too Partisan to Permit the System to Succeed 194
3.4 Parliament Has No Authority to Oversee the Government's Compliance with Laws 196
3.5 Canada Already Has an Effective Way to Resolve Disagreements 199
3.6 Contradictions and Inconsistencies in the Government's Views on Responsibility, Accountability and Answerability 202
3.7 Conclusions 205

4 A Canadian Solution 207

4.1 The Deputy Ministers 210
4.2 The Treasury Board 212
4.3 The Public Accounts Committee 214
4.4 The Auditor General 215
4.5 The Process of Implementing Reforms 215

Note 217

Appendix A:
The Ministerial Direction over the "Advanced Jet Trainer — Hawk 128" 218

Appendix B:
Sir Tim Lankester and the Pergau Dam 221

MINISTERIAL RESPONSIBILITY AND THE *FINANCIAL ADMINISTRATION ACT*: THE CONSTITUTIONAL OBLIGATION TO ACCOUNT FOR GOVERNMENT SPENDING **231**

Stan Corbett

1 Introduction 231

2 Ministerial Responsibility in Canada 233

3 The Constitutional Basis of Ministerial Responsibility 240

4 The Statutory Basis of Financial Accountability 244

5 Responsibility, Accountability, Liability 248

6 Recent Statements on Responsibility and Accountability 260
  6.1 Deputy Ministers' Direct Accountability 264
  6.2 Deputy Ministers' Indirect Accountability 265
  6.3 Conflict Resulting from Deputy Ministers' Accountabilities 265

7 Conclusion 280

PUBLIC ACCOUNTABILITY OF AUTONOMOUS PUBLIC ORGANIZATIONS **297**

B. Guy Peters

1 Introduction 297

2 Ideas About Accountability 302
  2.1 Answerability 303
  2.2 Accountability 303
  2.3 Responsibility 304
  2.4 Responsiveness 305
  2.5 Conflicts Within Components of Accountability 306
  2.6 Accountability and Many Hands 307

3 The Crown Corporation 309
  3.1 Mechanisms for Control 313
  3.2 Alternative Patterns of Governance and Accountability 319
    3.2.1 The Swedish Model 319
    3.2.2 The Dutch Experience 322

3.2.3 Involvement of Social Partners 323
3.3 Performance Management 324

4 The Public interest 328

5 Conclusion 330

6 Recommendations 332

APPENDIX A: LIST OF AUTHORS **337**

INTRODUCTION

Donald Savoie

In the fall of 2004, Justice Gomery invited me to join the Commission of Inquiry into the Sponsorship Program and Advertising Activities as its Director of Research for phase II of the Commission's work, or what commonly became known as the recommendation phase. He laid out an important challenge for the research program by asking: "Do you know what makes a good judge?" I did not know the answer, as my puzzled look surely revealed, and he quickly replied: "Two good lawyers in front of the judge representing both sides of the case in a very competent manner." To be sure, the point was not lost on me: Justice Gomery was prepared to consider any issue, so long as the research program was able to provide a solid case for both sides. At no point did Justice Gomery indicate a bias on any question, a preconceived notion or the suggestion that the research program should consider any issue, or look at it from a given perspective. This approach also guided his participation at all the Advisory Committee meetings and at roundtable discussions held in five regions between August and October 2005.

I took careful note of the Commission's mandate and its terms of reference. The terms of reference called on Justice Gomery to make recommendations, "based on the factual findings" from phase I, "to prevent mismanagement of sponsorship programs or advertising activities." It listed a number of specific issues to review and asked for "a report on the respective responsibilities and accountabilities of ministers and public servants."

I monitored the testimony from witnesses who appeared before Justice Gomery, in both the Ottawa and the Montreal sessions. I also produced a paper designed to identify the key issues for the Commission to consider. I met regularly with Justice Gomery to review the issues and the Commission's research program as it was being planned. He asked early on that I take into account what the government was doing to reform its management activities and to review the various documents being tabled by the President of the Treasury Board, so the Commission would not try to reinvent the wheel. He noted, for example, that the Treasury Board had produced a solid document on the governance of Crown corporations. He made the point that, rather than start from scratch, we should offer a critique of the document and compare its findings with developments in this area in other countries.

The Commission's research program was the product of many hands. In particular, I want to single out the work of Ned Franks, Professor Emeritus at Queen's University and one of Canada's leading students of Parliament. He helped with every facet of the research program, from identifying issues to study, to recommending scholars and practitioners.

The Commission's Advisory Committee also provided important advice and support to the research program. The Commission was able to attract an impressive list of Canadians to serve on the Committee, led by chairman Raymond Garneau, a leading business person from Quebec, a former Minister of Finance in Quebec and a former Member of

Parliament in Ottawa. Other members included Roch Bolduc, a former Senator and former senior public servant with the Quebec Government; Professor Carolle Simard, from the Department of Political Science and Public Administration at the Université du Québec à Montréal; Bevis Dewar, a former Deputy Minister of Defence and head of the Canadian Centre for Management Development, recently renamed the Canada School of the Public Service; the Honourable John Fraser, a former federal Cabinet minister and former Speaker of the House of Commons; Constance Glube, a former Chief Justice of Nova Scotia; Ted Hodgetts, Professor Emeritus at Queen's University and a member of the Royal Commission on Financial Management and Accountability (Lambert Commission) and editorial director for the Royal Commission on Government Organization (Glassco Commission); and Sheila-Marie Cook, a former official with the federal government and the Commission's Executive Director and Secretary. I acted as Secretary to the Advisory Committee.

I can hardly overstate the importance of the work of the Advisory Committee in designing and overseeing the Commission's research program. I benefited greatly from the wise counsel members provided to me both individually and collectively, from their insights and their necessary words of caution. They were generous with their time and their patience. They read the various research papers and provided advice on how to make use of their findings in shaping the phase II report.

At its most general level, the Commission's research program examined how Parliament relates to the Canadian Government and to public servants, and vice versa; how best to promote transparency in government; and the role of key political and administrative actors in government. The papers produced for the Commission promote various perspectives, and at times conflicting ones. This diversity was by design. The papers also offer different methodologies. We were fortunate in being able to attract leading scholars in their fields to produce these research papers for the Commission. We also turned to practitioners for papers dealing with exempt staff, internal audit, and advertising and sponsorship issues.

The papers deal with all the issues Justice Gomery was asked to address. They look at the respective roles of Parliament, ministers and senior public servants; the appointment process for deputy ministers and the evaluation process for them; access to information; and legislation for whistle-blowing and lobbying.

The Papers

"The Role of the Clerk of the Privy Council," by S.L. Sutherland, explains that the Clerk of the Privy Council, as the most senior non-political official in the Canadian federal government, facilitates the collective form of government through the flow of papers and information to and from the Cabinet. The incumbent holds three titles in addition to "Clerk": Secretary to Cabinet, Deputy Head to the Prime Minister, and Head of the Public Service. The double identification as both Clerk and Secretary is owed to the accretion of public law in Canada, which has resulted in two bodies managing the core executive functions of the state — both the Cabinet and the Governor in Council.

This paper reviews the institutional context for, and the development and current role of, the Clerk of the Privy Council, as well as the newer role as Head of the Public Service of Canada. Sutherland compares this role with that of the Secretary to Cabinet in Britain. She reports on how successive Canadian clerks have understood their role, played their role and written about their role; how others have assessed their performance; and how various elements of the Clerk's role have changed over time. The paper identifies the forces that have driven the adjustments, including more recent developments in public administration such as horizontality and the New Public Management system. Sutherland concludes with recommendations on adjustments to the Clerk's role that might improve and clarify accountability.

As the Government's senior official supporting the Prime Minister, the Clerk advises on and explains public policy emanating from anywhere in the system and interprets the capacities and weaknesses of the public service apparatus. The Clerk is the centre of one of the most urgent and broadest information flows in government. Working with the Prime Minister or the Chief of Staff in the Prime Minister's Office (PMO), the Clerk is also an important problem-solver in the public service and is at the interface between the public service and the political actors.

The policy scope of the Clerk arises from the requirement for the Clerk not only to ensure that the Cabinet paper system is well managed and that Ministers are well served but to achieve intellectual mastery of the content of current files, so as to be able to provide advice as required to the Prime Minister. Issues flow into Cabinet from Ministers, and also to the Prime Minister from the PMO. The PMO is a co-advisor of the Prime Minister, and the two streams of advice must be reconciled.

With the proclamation of the amended *Public Service Employment Act* in 1993, the role of Head of the Public Service became a formal responsibility of the Clerk. It seems clear from the brevity of the establishing clause and from the lack of duties and resources attached to the role that it was never intended to be an executive function. The Clerk's role as Head is to represent the Government to the public service and to express the needs of the public service to the Government. The Clerk is directly responsible to the Prime Minister to provide support for deputy head appointments made by the Prime Minister under the prerogative, by Order in Council. In cases where "the required balance" between accountabilities cannot be maintained, or in any matter where a deputy feels his or her own accountability with that of the Minister or with the agenda and direction of the Government is significantly affected, the Deputy Minister is asked to consult the Clerk.

The biggest change in the Clerk's duties centres on the Clerk's role as problem-solver. This responsibility has led to criticism that the Clerk's role is being overly politicized. The Clerk meets every morning with the Prime Minister and the Prime Minister's Chief of Staff, so is in the position to act quickly to minimize difficulties where he or she has leverage and believes the activity to be appropriate to the role. The quality of personnel in the PMO varies over time, and the Clerk is at the centre of information networks in government. If the Clerk outperforms the political office, the Prime Minister will likely make greater use of the Clerk's mediation capacity.

In the 1990s, Canada's implementation of the New Public Management system coincided with both a reorganization in government and cuts in spending through Program Review. Talk of empowerment and risk-taking was the gloss put on the various restraint measures. In this climate of rapid change, however, important issues of control and risk, including the amount of risk created for the political leadership, were not fully thought out. The New Public Management environment provided a background of "administrative laxity."

Sutherland asks whether risk management in the federal government is sufficiently attuned to *political* risk. Both the Deputy Minister of Public Works and Government Services Canada and the former Clerk of the Privy Council, Jocelyne Bourgon, told the Sponsorship Inquiry that they were fully occupied with other files and did not focus their attention on the Sponsorship initiatives. The author concludes that it might be wise to ask the Treasury Board to monitor political risk to lower the incidence of political scandals.

Sutherland makes eight recommendations under two general themes—the first four aim to modernize the Clerk's role, and the second four to reinforce the integrity of the centre:

1. Add explicit probes to the Clerk's script for annual deputy head appraisals to ensure that deputy heads communicate their ethical worries to the Clerk, and, reciprocally, that the Clerk clarifies his or her own views to the deputies.

2. Abolish the Clerk's "Head" role and create the ministerial title "Minister of the Public Service" for the President of the Treasury Board.

3. Remove the informal title of "Deputy Minister to the Prime Minister" from descriptions of the role of the Clerk and Secretary to Cabinet.

4. Change the name of the Clerk of the Privy Council to Cabinet Secretary.

5. Link the seniority of the Clerk in relation to other deputy heads to his or her role as the final guardian of the Constitution, the workings of Cabinet government, and the machinery of government.

6. Encourage Canada to consider creating a permanent Committee on Standards in Public Life, similar to that established in Britain in 1994.

7. Remind politicians that they could reduce political risk by establishing a self-governing mechanism to conduct random audits of contracting in ministerial offices and of small-budget organizations overlooked by the Office of the Auditor General.

8. Devise a modification for Canadian political circumstances of the British Accounting Officer system to prevent clashes over potentially illegal or clearly unwise expenditure by ministers.

"Responsibility, Accountability and the Role of Deputy Ministers in the Government of Canada," by James Ross Hurley, reports that, in the United Kingdom, permanent heads—the equivalent of deputy ministers in Canada—wear a second hat: they are appointed as accounting officers and have direct and personal responsibility for the management of public funds and public property. They are answerable before parliamentary committees and are accountable to their ministers for the discharge of their responsibilities. If a Minister asks the Accounting Officer to spend money in a way that the Accounting Officer believes contrary to propriety, regularity or value for money, the Accounting Officer should try to convince the Minister to the contrary and, if unsuccessful, must ask the Minister to put the order in writing; the Accounting Officer then files the Minister's order, along with a statement of his or her objections to it, with the Treasury and the Auditor General. The money is then spent as directed by the Minister, but, at a later date, when accounts are examined, there is a written record of the disagreement, which may, in some circumstances, be made public.

Hurley insists that the Accounting Officer operates in a particular environment: the British Public Accounts Committee is prestigious, the tenure of members is long, the Committee is non-partisan, and a governmental official from the Treasury sits at the committee table and supports the Committee in its work. The Committee seeks to clarify issues, not to apportion blame. In Canada, in contrast, membership on the Public Accounts Committee changes regularly, the Committee is highly partisan, and there is often a desire to assign blame.

The British institution of Accounting Officer is relatively formal, at least compared with Canada. Although Canada has a mechanism for handling disputes between deputy ministers and ministers concerning financial management, it is informal and private. If, in discussion, a Minister instructs a Deputy Minister to take action that would offend the principles of propriety, regularity, value for money or the general policies of the Government, the Deputy Minister can communicate with the Clerk of the Privy Council and seek intervention (on the Prime Minister's behalf or by the Prime Minister). The advantage of this approach is that it has the potential for averting the improper allocation of funds before it occurs. It also keeps confidential any disagreement between the Minister and the Deputy Minister—conflict that, if public, might be used by a partisan Public Accounts Committee to envenom relations between the Minister and the Deputy Minister.

Hurley does not recommend that the British institution of Accounting Officer be adopted in Canada. He adds that the flagrant breakdown in the proper and orderly governance of Canada which occurred in the Sponsorship Program was due to human error, not the lack of institutional safeguards. Rather than introducing the Accounting Officer concept, Hurley recommends that ministers and their exempt staff be briefed, as they are appointed, on the specific roles and responsibilities of both political and professional actors; on the need to respect the office of the Deputy Minister as the bridge between them; on the need for propriety, regularity and value for money in public expenditures; and on the centrality of values and ethics in the operation of Canada's system of responsible parliamentary government. Deputy ministers (in their performance agreements) and public service managers (through instructions, courses or training) should be impressed with the centrality of values and ethics in the operation of Canada's system of responsible parliamentary government, the need to speak the truth once in power, and the importance of propriety, regularity and value for money in public finances. In brief, these issues should be key components in the Performance Management Program for deputy ministers and in the performance evaluation of public service managers.

•

"The Respective Responsibilities and Accountabilities of Ministers and Public Servants: A Study of the British Accounting Officer System and Its Relevance for Canada," by C.E.S. (Ned) Franks, examines the respective responsibilities and accountabilities of ministers and deputy ministers for financial administration in Britain and in Canada. To do so, it compares the British Accounting Officer system for accountability of ministers and deputy ministers to Parliament with Canadian practices. Though the two parliamentary systems are in many respects similar, they differ markedly in the way their governments and parliaments interpret and enforce the role, responsibilities and accountability of ministers and senior public servants for financial administration.

In Britain, the permanent secretaries (deputy ministers) of departments are designated as "accounting officers" for their departments. In their position as accounting officers, they have full and personal responsibility for ensuring that the standards of regularity, propriety and value for money are observed in the financial administration of their departments. Accounting officers cannot delegate or otherwise evade this responsibility. As the British Treasury observes, "In practice, an Accounting Officer will have delegated authority widely, but cannot on that account disclaim responsibility."

A British Minister can overrule an Accounting Officer through written "ministerial directions." The correspondence between Accounting Officer and Minister relating to a ministerial direction is transmitted to the Treasury and the Auditor General. This correspondence does not explain in any detail the reasons behind either the objection or the ministerial direction. It simply puts on record that the overruling has occurred and hence the Minister, not the Accounting Officer, bears responsibility and is accountable for the decision. The process does not violate the confidentiality of discussions between Minister and Accounting Officer. The process also ensures that, because the Minister has the power to overrule an Accounting Officer, ministers can impose their decisions on the accounting officers. This distinction preserves the principle of ministerial responsibility.

The forum for the accountability of accounting officers is the Public Accounts Committee of the British House of Commons. This Committee has an enviable record of well over a century of valuable, non-partisan work in both creating and strengthening the position of the accounting officers as the key holders of responsibility for financial administration. The Committee and the Treasury work together toward achieving their common goal of probity in financial administration. The British Parliament regards the Treasury as its ally in this quest.

Together the British accounting officers, the Public Accounts Committee, the Treasury, and the Comptroller and Auditor General make a coherent and effective system for financial accountability to Parliament and for ensuring that rules, regulations and statutory authorities are observed. The British Treasury advises accounting officers that they should, if they have doubts about a proposed course of action, ask themselves: Could I satisfactorily defend this before the Public Accounts Committee? And since accountability to Parliament is part of a wider accountability, the question can be put even more simply: Could I satisfactorily defend this course of action in public?

The Canadian approach to financial accountability to Parliament, Franks maintains, does not have the clarity or coherence of the British, though Canadian deputy ministers have roles and responsibilities similar to those of British permanent secretaries. In fact, Canadian deputy ministers possess greater statutory responsibilities in their own right than do British accounting officers. Nevertheless, the Canadian government insists that, unlike their British counterparts, Canadian deputy ministers do not have an accountability relationship with the Public Accounts Committee. Canadian deputy ministers appear before the Committee on behalf of their ministers, even when the issue in question relates to statutory responsibilities that belong to deputy ministers, not to ministers. This division of responsibility is the fundamental and single greatest difference between the British and Canadian approaches to accountability to Parliament for financial administration.

Many arguments have been presented in Canada to support the Government's rejection of a Canadian version of the Accounting Officer system. Several of these arguments stem from misunderstandings of the British system, including the incorrect claims that, first, the British system allows the Public Accounts Committee to reward, punish and instruct accounting officers; second, the Accounting Officer system violates the principle of ministerial responsibility; and, third, it destroys the confidentiality and trust necessary between Minister and Deputy.

Franks maintains that an effective system for financial accountability does not require change to the statutory responsibilities of deputy ministers, but it does require change to the way deputy ministers are held accountable. Parliament and Government have common interests in ensuring regularity, propriety and value for money in financial administration. The instruments for ensuring these elements of financial accountability are, on the parliamentary side, the Auditor General and the Public Accounts Committee, and, on the Government's side, the deputy ministers and the Treasury Board. Two parts of a coherent and effective system are missing in Canada: first, an appropriate focus on the accountability of deputy ministers, the persons who hold clearly assigned statutory responsibilities for financial administration; and, second, a Treasury Board that supports both the Public Accounts Committee and the deputy ministers in the quest for probity in financial administration.

Canadian practices took their present form under the different conditions of the past, when the Public Accounts Committee was weak and ineffective, when a strong role for ministers in the details of financial administration was an accepted practice, and when controls through central agencies of Government dictated a minor role for deputy ministers. Much has changed. The roles of the various bodies have not adapted to accommodate these changes. The purpose of reform should be to ensure that each of these players performs the appropriate role, and that, together, they create an effective and coherent system for accountability to Parliament for financial administration. Franks concludes with a series of recommendations:

- Deputy ministers should be accountable in their own right as the holders of responsibility before the Public Accounts Committee.

- The Government should establish a formal process through which a Minister can overrule a Deputy Minister's objections on matters related to the powers that deputy ministers hold in their own right.

- These overrulings should be recorded in correspondence between the Minister and the Deputy. This correspondence should be transmitted to the appropriate officer in the Treasury Board Secretariat and be available for examination by the Office of the Auditor General.

- Deputy ministers should serve in an office for three to five years.

- The Treasury Board should prepare a protocol that instructs and informs deputy ministers on the scope of those matters for which they hold personal responsibility and are liable to be held accountable before the Public Accounts Committee. This protocol should be agreed to by the Public Accounts Committee, and it should establish the ground rules for the appearance of deputy ministers as witnesses before the Committee.

- Members of the Public Accounts Committee should be expected to serve on the Committee for the duration of a Parliament.

"Ministerial Responsibility and the *Financial Administration Act*: The Constitutional Obligation to Account for Government Spending," by Stan Corbett, analyzes ministerial responsibility in the context of the Westminster model applied to Canada, drawing on the literature and a detailed review of relevant legislation and court cases. The paper examines the constitutional basis of ministerial responsibility and the statutory basis of financial accountability. The concepts of responsibility, accountability and liability are analyzed in the context of the *Financial Administration Act* as an instrument of policy.

Corbett points out that Canadian courts have occasionally endorsed the view that there is a straightforward separation of powers in the Canadian Constitution: the legislature's role is to decide upon and enunciate policy; the executive's role is to administer and implement that policy; and the judiciary's role is to interpret and apply the law. He adds, however, that the Supreme Court has acknowledged that the role of the executive is somewhat more complex. The courts have stated explicitly that the reality of Canadian governance is one in which the executive frequently controls the legislature. Hence, the doctrine of the separation of powers finds its own special application within the Canadian context: it is in the role of the courts vis-à-vis the legislature and the executive rather than in the relation between the executive (understood to include the Cabinet) and the legislature (which includes ministers). The line between the legislature and the executive separates the dual roles of individual Cabinet ministers. The obligation to respect the separation of powers is an essential part of the idea of ministerial responsibility. As lawmakers and as executive actors, ministers are subject to both the democratically expressed will of Parliament and the rule of law. Ministers are also partisan political actors.

Corbett argues that the doctrine of ministerial responsibility contains both political and legal elements. It is of some importance whether ministerial responsibility is placed within the legal or the conventional part of the Canadian constitutional order. Individual ministerial responsibility has been characterized as legal, while collective ministerial responsibility is thought of as a political convention. Under the former, ministers are responsible for the actions of their departments, while, under the latter, ministers are responsible for the policies of their government. The point of holding ministers legally as well as politically responsible for the actions of their departments draws attention to the fact that the minister is responsible under the Constitution for ensuring that the business of the department is conducted in accordance with the rule of law. This responsibility is more than a matter of politics or convention.

The courts, according to Corbett, have recognized the constitutional basis in law for the House to exercise its supervisory authority over executive spending. *The Constitution Act, 1867*, requires House of Commons approval of all expenditures of public money. That is not a matter of convention; it is a legal requirement. It would be a breach of section 53 of the Act for Cabinet to authorize the spending of public money without approval from the House of Commons, and all delegation of the authority to spend public money must be explicit. Section 54 requires that all expenditures be first recommended to the House by "Message of the Governor General" in the session in which the action is proposed. In practice, "Message of the Governor General" means a bill originating in Cabinet. In effect, section 54 restricts the role of House approval of public revenue appropriations to requests that originate in the executive branch. Together, sections 53 and 54 provide that governments must publicly request funds from the House of Commons for publicly identified purposes. Once authorized, those funds must be spent for the purposes for which they were requested. The courts have recognized the constitutional basis in law, not convention, for the House to exercise its supervisory authority over executive spending. Without the surveillance power of the House, the requirement for approval would collapse into a mere formality.

The Financial Administration Act (FAA) has been the primary statutory instrument through which the House of Commons endeavours to ensure that public money is spent only for purposes that have received its approval. The purpose of the Act is to keep track of public money, and all government expenditures fall within the scope of the *FAA*. As a legal instrument, the Act should be understood as one of the means whereby the House of Commons fulfills its constitutional obligation to hold the executive accountable for the spending of public money, and it is intended to impose certain legal obligations on the political executive.

The distinction between the failure to meet one's responsibilities and the failure to account for those responsibilities is central to the *FAA*. More precisely, Corbett maintains, the Act is concerned with ensuring that individuals account for the performance of responsibilities assigned elsewhere, such as in statutes establishing government departments or in the regulations, guidelines and codes enacted under them. While an essential feature of all executive decision-making is discretion, including the discretion to spend, the grant of discretion does not imply freedom from the obligation to account.

The *FAA* thus serves two political masters—Parliament and the Governor in Council. The Act is an instrument for parliamentary surveillance of executive spending, and it also provides the framework within which those in receipt of public money must account to Cabinet. Parliamentary surveillance of executive spending is performed primarily by the opposition parties in the House. Cabinet surveillance of executive spending, in contrast, is performed by members of the party holding power. It is here that the built-in potential for conflict between the two purposes served by the Act is most evident. Parliament has other means of keeping track of public money, such as the Public Accounts Committee and the Auditor General, but these bodies perform their functions from outside the day-to-day operations of the public service. The *FAA* applies more directly to the inner structure of the public service. More than any other piece of legislation, the Act addresses the point at which the partisan interests of the political executive meet the traditional administrative neutrality of the public service. The public service is required to be non-partisan: loyal public servants must carry out the directives of the government of the day within the limits of the law. They cannot express partisan opposition to the policies of the government in power on ideological grounds, though they are obliged to express opposition to government initiatives that would require breaking the law. Public servants must also be assured that decisions made in compliance with these requirements will have no impact on their opportunities for advancement.

The connection between the legal and the political lies at the heart of a system of democratic government under the rule of law. The legal and the political, Corbett points out, are necessarily linked because it is only if the executive branch has met its constitutional obligation to inform Parliament of its activities that Parliament will have the opportunity to hold the government that controls the executive politically responsible. Political responsibility does not focus so much on acting in accordance with the law, as it presupposes that the Government has met its legal obligations, both constitutional and statutory. For this reason, the concept of legal responsibility cannot simply be subsumed under the general heading of ministerial responsibility, if this latter term is understood in an exclusively political sense. That is why it is accurate to say that deputy ministers are not politically accountable to Parliament, and inaccurate to say that they are not legally accountable to Parliament.

"Public Accountability of Autonomous Public Organizations," by B. Guy Peters, argues that the Government of Canada may not be able to accomplish its governance and financial responsibility objectives because of the "ambiguous nature of control and accountability" in dealing with Crown corporations, foundations, contracted organizations and other autonomous public bodies. The differing organizational forms and the variations in the degree of government control in these bodies, in contrast to the typical structure of government departments, complicate an already complex array of institutions mandated by the Government to perform various tasks at arm's length.

Peters provides a series of definitions. He describes *answerability* as the notion that all an organization must do to satisfy its obligations is to answer for its actions. He says that *accountability* means that organizations have to render an account of action, but they will also be judged by some independent body on that action. And *responsibility*, he explains, involves assignment and a more inward source of control being exercised over the actions of public servants.

Peters maintains that ministers have some degree of control over Crown corporations through three means: the law (although it may not specify the control procedures), the corporate plan (permitting review and opportunities to comment but not make changes), and their capacity to assume direct control (in extreme cases of failure). Much of his commentary is related to the 2005 Treasury Board report *Review of the Government Framework for Canada's Crown Corporations—Meeting the Expectations of Canadians*. He also reports on experience in this area in Belgium, Sweden and Britain.

He refers to this report's advocacy of a stronger role for ministers and for the boards of Crown corporations as a starting point. The report calls for a clear mechanism for holding the boards and their members accountable for the performance of corporations. It also suggests that it is important for the entire public sector, including the arm's-length organizations, to develop the capacity for greater coherence and coordination.

•

Peters rejects the Treasury Board view that the role of public servants on the boards of Crown corporations should be attenuated. Rather, he argues, public servants have the virtues of being socialized into values of public responsibility and probity to a greater extent than the average outsider in the public sector. He goes on to suggest that public servants are influenced by conflicting pressures to serve their ministers, respond to stakeholders, answer to Parliament, and maintain the public service ethos.

Peters suggests that a combination of financial accounting and performance auditing be extended more fully to Crown corporations. The paper makes five specific recommendations:

1. On-line public reporting and monitoring of the government contracting processes.

2. Inclusion of public servants as members of Crown corporation boards.

3. Appointments to boards through processes similar to those in the public service.

4. Clarification of the relationships and accountabilities of ministers, boards and chief executives of the Crown corporations.

5. Alternative and enhanced parliamentary mechanisms for the scrutiny of Crown corporations.

Peters, in several instances, equates "control" with ministerial "accountability." The reduction or elimination of that control (along with introducing market and independent financial discipline) was the reason for establishing many Crown corporations. The consequent ambiguity in accountability was inevitable, Peters says, and there is an inherent but tolerable contradiction in any organizational arrangement that faces this tension of conflicting objectives.

THE ROLE OF THE CLERK OF THE PRIVY COUNCIL

S.L. Sutherland*

1 Introduction

Richard French aptly notes that, to grasp the gist of our working Constitution at the federal level, Canadians must first learn the history of Westminster Government and its "anachronistic titles and vestigial institutions."[1] The Privy Council, for example, was once the intimate council of an absolute Monarch. The modern Canadian Privy Council Office (PCO), on the other hand, takes responsibility for the quality of information and advice that move forward to Cabinet; and it runs the Cabinet paper system, distributing necessary information for decisions and discussion and, following decisions, circulating the information to committees of Cabinet and individual ministers. Thus, despite bearing the name of a Council that brought every matter of state to one overloaded and unaccountable Monarch, the gist of the contemporary function of the Privy Council Office's Secretariat is, ideally, the opposite: to distribute preparatory information to and work among ministers and committees, to increase to the maximum the capacity of the Government to engage its personnel and to act responsibly in the political space granted to it by the electorate.

The historical recency of anything like what we now see as the footprint of responsible government in the Westminster tradition is important to grasp. The gradual confinement of the Privy Council to a minor role is part of a package in which the powers of the Crown, in effect those of the state itself, were removed from the Monarch and put in the hands of a council of elected officials, themselves accountable to the assembly and an electorate. William Pitt the Younger, who led the Ministry from 1783 to 1801, was the first to prevail in obtaining from the King the resignations of other ministers. After this event, the conventions of collective Cabinet responsibility and prime ministerial control of the Ministry could begin to jell. That control would lead to responsible government—the identification of the whole group of ministers with the program of the Government. The *Reform Act* of 1832 emphasized the requirement that the Government be able to retain confidence in Parliament, conferring upon Parliament the responsibility to supervise the executive. The person bearing the title of Prime Minister, although it had been in loose use since the 18th century, was given official recognition by the King only in 1905—the *London Gazette* reporting on December 5 that, in future, the Prime Minister of the day would make his entry to dinners at the Palace and other State occasions after the Archbishop of Canterbury and before the Archbishop of York.[2] And, as we all know from our Bagehot, the conventions of responsible government, in the sense that an elected executive had full control over the conduct of public business, were working effectively and smoothly enough to be clearly described only by the final third of the 19th century—and before the advent of full male suffrage.[3]

The "Clerk of the Privy Council" is the most senior non-political official serving the responsible government, in other words, the executive, of the Canadian state. The Clerk's seniority arises from the importance of his or her duty to facilitate collective government through the flow of papers and information to and from Cabinet, and to serve as the interpreter and guardian of the integrity of the law and conventions of the Constitution in relation to the clerkship. The incumbent holds three titles in addition to "Clerk": Secretary to Cabinet, Deputy Head to the Prime Minister in the latter's role as Minister for the Department of the Privy Council, and Head of the Public Service. The double identification as both Clerk and Secretary is owed to the accretion of public law in Canada, which has resulted in the presence of a small number of "different bodies involved in the process of governing"[4]—managing the core executive functions of the state. The more important of these two bodies in terms of decision-making is beyond doubt the Cabinet, but the Governor in Council is formally indispensable to sign off subordinate legislation.

There are further aspects to the Secretary and Deputy Head roles that are easily deduced but which can more readily be kept in mind if made explicit. As the senior official in Government, supporting the Prime Minister, the Clerk will give advice and explanations to the Prime Minister about public policy emanating from anywhere in the system, and will interpret to the Prime Minister the capacities and weaknesses of the public service apparatus. Indeed, given the frequency of the Clerk's contacts with the Prime Minister, with political staff in the Prime Minister's Office (PMO) who support the Prime Minister in his or her political responsibilities, and with senior public service colleagues, the Clerk is the centre of one of the most urgent and perhaps the single broadest information flow in Government, with all the associated note-taking for follow-up, reflection, consultation, memorandum-writing and explicit delegation that this implies. It is not surprising, then, that another of the Clerk's functions is to act for the Prime Minister as a mediator. Working with the Prime Minister or with the Chief of Staff in the PMO, the Clerk is an important problem-solver in the public service and at the interface between the public service and the political actors.

To cite Peter Aykroyd's summary: "[T]he administrative head of the Privy Council office, the principal officer of the Cabinet Secretariat, the principal servant of the Governor in Council and the principal government adviser to the Prime Minister are all wrapped up in one function, the Clerk of the Privy Council and Secretary to the Cabinet."[5]

2 Terms of Reference

The issues set for this study include the following:

- the institutional context for, and the development and current role of, the Clerk of the Privy Council and the newer role as Head of the Public Service of Canada;

- the institutional context for, and the development and current role of, the Secretary to Cabinet in the United Kingdom, including the role of Head of the Home Civil Service;

- an indication of how successive Canadian Clerks have understood, played and written about their roles (including the role of Head of the Public Service), how others have assessed their performance, how various elements of the Clerk's role have changed over time, and, to the extent possible, identification of the forces that have driven the adjustments—including more recent developments in public administration such as horizontality and the New Public Management;

- a comparison of the roles of the Clerk of the Privy Council and the role of the Secretary to Cabinet in Britain, including contrasts in the organizational machinery and in the broader institutional environment that condition the reception of individual provisions; and

- an assessment of possible adjustments to the Canadian Clerk's role that might improve and clarify accountability.

The research method was, primarily, to draw on published materials, searching for initial and contemporary rationales and commentaries. However, given the comparative lack of published articles on their experiences by Canadian Clerks, I interviewed 13 individuals who currently hold or have held the most senior positions in the federal public service's central agencies, and one of Canada's most respected parliamentary journalists.[6] I will not cite my interviewees individually in this place because, although each has a unique and revealing take on certain aspects of the role, as one could expect from their experiences, their opinions on the above issues clustered very strongly. Thus the interview materials are central to the arguments made in the judgmental and evaluative portions of the study. Further, to test whether the media profile of Clerks has risen steadily over time, making for more or different challenges for contemporary Clerks, a research assistant, Lindsay Aagaard, and I used the *Times of London* and the *Globe and Mail* as the newspapers of record, searching within years on the names of, respectively, secretaries to Cabinet and Clerks—and on several variations of the titles—and then consolidating the counts into the terms of office of the individual office holders.[7] The procedure yielded some rough but interesting comparisons between Canada and the United Kingdom.

3 Canada: The Clerk of the Privy Council

3.1

The Clerk Role: Guardian of the Integrity of the Cabinet Decision-making System

In Canada, the title Clerk of the Privy Council dates from Confederation: the Governor General in Council after 1867 would carry on as the formal executive, acting on the advice of the Queen's Privy Council for Canada, "at the same time a Clerk of the Privy Council was appointed and duly sworn."[8] The first incumbent was the person who had, for the previous 25 years, served as Clerk of the Executive Council of the Province of Canada.

As Halliday notes, "Executive power in Canada is formally vested in the Crown,"[9] its statutory powers being provided in the *British North America Act*, while prerogative powers are "delegated by the Sovereign to the Governor General acting on the advice of the formal executive"[10] —the Privy Council. Hogg defines the royal prerogative as the powers and privileges accorded by the common law to the Crown, and describes it as a branch of the common law, "given that the courts have defined its extent."[11] Prerogative powers are wielded by the Prime Minister and regulated by convention as opposed to formal law. Replacement of an initially wide range of prerogative powers by statute has reduced them to the conduct of foreign affairs, including the settling of treaties and the declaring of war, the appointment of the Prime Minister and other ministers, the issuing of passports, and the conferring of honours.[12]

The *BNA Act* provides that the members of the Privy Council will be both chosen by and summoned to be sworn in by the Governor General. The first Canadian Privy Councillors were sworn on July 1, 1867, swearing at the same time the oath as heads of their departmental assignments. Therefore the Privy Council and Cabinet can be adequately understood as two aspects of one constitutional organism or body.[13] The Council is a legal entity for tendering advice to the Crown, and the Cabinet is the policy-making body. Cabinet may turn to the Council for a formal instrument (an Order-in-Council, subordinate legislation) conferring authority to implement a policy, but it may also proceed by passing new legislation, or act under an interpretation of existing statute law.

3.2

Secretary to Cabinet

More than 20 years before a Canadian Prime Minister would decide it was necessary to provide a structure of organization for Cabinet business, the British had put such a system in place. Finally, in 1940, Prime Minister William Lyon Mackenzie King and Arnold Heeney, who would be the first modern Clerk of the Privy Council, found it convenient to graft the vastly more significant role and title of Secretary to Cabinet to that of the Clerk of the Privy Council.[14] The Clerk had long been acknowledged as the most senior public servant in Government, and it was thought wise to place the new powers and machinery under this title.[15] The machinery soon became a modern Cabinet Office modelled on the British Office of 1918, but, as will be seen, functioning under Canadian conditions. As we shall also see, one of the Canadian conditions is, on average, a considerably larger number of Cabinet ministers and departmental organizations than in Britain. At time of writing, there are 38 ministers in Mr. Martin's Cabinet, in comparison to 22 in the United Kingdom, a unitary government.

The Privy Council Office was designated a department of government in 1952 for purposes of the *Financial Administration Act* (FAA), by Order-in-Council, and was assigned to the Prime Minister in 1962.[16] From these two adjustments it falls to the Clerk to serve as Deputy Head for the Department of the Privy Council Office (from this point also to be called PCO), adding planning, policy and management responsibilities for the core functions of the executive to already considerable responsibilities to support the operation of Cabinet as a collective government. It is important to be clear that a meeting of ministers led by the Prime Minister is not a Cabinet meeting or a meeting of a Cabinet committee unless the Cabinet Secretary or a delegate is present, an agenda has been distributed, and a record has been made of the discussion. If these conditions are not met, the event is defined as a political discussion.

The greatest part of the Secretary's profile, perhaps until recently when the role was somewhat eclipsed by the less formal "DM to the PM" title, is owed to his or her supporting role for the Prime Minister's primacy in what Heeney calls "the machinery of executive government," or "matters of [Cabinet] organization and procedure."[17] The Prime Minister not only chooses ministers and dismisses them individually, but he or she also controls how their careers proceed. The organizational work includes managing ministers in Cabinet; determining meeting schedules, the agendas and the order of discussion for full Cabinet and committees; and determining whether there will be more or fewer meetings, the number and terms of reference of Cabinet committees and their membership, and where work will be routed. Mastery of Cabinet business can be subsumed under a list of prerogatives of the Prime Minister first produced as a minute of Privy Council in 1896.[18] This Order was last reissued in 1935, the PCO commenting that the minute did not confer the Prime Minister's prerogatives, but rather recognized them.[19] Tardi also attributes the powers, duties and functions of the Prime Minister to "constitutional conventions, custom and usages."[20]

Besides the Prime Minister's rights in regard to Cabinet, the above Order specifies that ministers cannot make recommendations to discipline another Minister, lists the most familiar appointments that fall within the Prime Minister's prerogative, and specifies that the Prime Minister can make recommendations in any department. The Cabinet Secretary supports the Prime Minister in all the above functions. The Cabinet Secretary or a delegate also takes minutes of Cabinet meetings, and the Secretary assigns staff to help organize committee meetings and papers, produces minutes, maintains the full record of Cabinet decisions, makes sure that committee business is coordinated, and further ensures the communication to ministers and involved officials of Cabinet decisions to ensure that differing impressions are corrected or reconciled.

The prime ministerial powers have led to criticisms that Cabinet government could more readily be called "prime ministerial government." This interpretation was clearly articulated first by Richard Crossman in respect to Britain in 1963.[21] Similar arguments likewise colour political discussion in Canada.[22]

But there are significant forces encouraging Cabinet government in Canada, and the Clerk is, as the guardian of the system, responsible for ensuring that these forces are served. Perhaps first are the federal influences, which affect to some extent the composition of Cabinet and of its committees and their operation. Canadian federal ministers can expect to bring to Cabinet any measure that will conceivably be received differently across the provinces and regions. "Each Minister tends to have a sort of 'veto' against actions affecting the region he or she has been assigned to represent,"[23] J.R. Mallory writes, an observation that has stood the test of time.[24] Mallory also emphasizes the formative and continuing influence on Canadian politics of colonial practices. In the early days of responsible government, before Confederation, it was useful, Mallory says, for the Governor and Canadian politicians to have an Order in Council as proof that the British Governor was not acting unilaterally and that self-government was an emerging reality. After Confederation, the note-taking in Privy Council meetings was continued as a useful record of what had been decided — although by all other accounts Cabinet itself was not similarly disciplined. The utility of a record reinforced the Canadian wholesale use of Minutes and Orders in Council as the normal form of executive action as opposed to the then more normal ministerial decisions in Britain's unitary government.[25] In short, the paper trail and federalism could make it awkward to proceed to decision without having consulted interested parties.

It may be true that while federalism creates speed bumps for a Prime Minister, it makes the Clerk's guardianship and management of the Cabinet paper system even more central and indispensable to the Prime Minister and the Government. Still another factor that creates independent weight in the clerkship is that the Privy Council Office is responsible for managing transitions between governments and safeguarding and managing the papers of successive governments.

3.3

Deputy Minister to the Prime Minister

3.3.1 The Organization of the Privy Council Office

The title Deputy Minister to the Prime Minister is applied to the Clerk because the Prime Minister is the Minister for Privy Council Office, making the Clerk its manager. The organization of both Privy Council Office and of Cabinet can change under different Prime Ministers and Clerks. As of August 2005, within the PCO estimates, in addition to the PCO (which provides corporate services to the Prime Minister's Office), the PMO proper, and five additional ministers, there were a number of independent investigations funded by the PCO, which, however, has no management authority over their use of funds. The 2005-2006 Report on Plans and Priorities (RPP) for PCO shows total budgetary estimates of $149.9 million, with a human resources total of 1,117 full-time equivalents (FTEs).[76]

In addition to the Prime Minister, there are another five ministers being supported by PCO. These include the two Leaders of the Government, in the House of Commons and in the Senate, plus three other ministers, each with two or more titles: Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness; the Minister for Intergovernmental Affairs, who also holds the title of President of the Queen's Privy Council for Canada; and the Minister for Official Languages and Minister for Internal Trade and Associate Minister of National Defence, who also serves as Deputy Leader in the House of Commons.[77]

Given that the list of PCO "secretariats" listed on its website does not exhaust the row of boxes lined up horizontally under the Clerk on its organization chart, it is probably simpler to get an idea of how PCO is structured from a site chart dated June 2005. Its share of the estimates above is $110.8 million, with 846 FTEs (no disaggregation is available in the RPP by secretariat). With one exception, that of National Science

Adviser, all persons in the top row sit on the PCO Senior Management Committee as well as the Legal Counsel and the Associate Secretary to Cabinet. This is a total of 11 direct reports to the Clerk, a large span of control that is added to by the Clerk's additional responsibilities for supervising staff work not included on any organization charts, such as the "Head" position and the associated annual report.

Support for the Cabinet paper system is organized by the Deputy Secretary, Operations, with a budget of $15.7 million, who manages the whole current flow of papers and meetings, with content support from dedicated divisions within Operations dealing with domestic social and economic affairs, regulatory affairs and Orders in Council. The Deputy Secretary Plans and Consultation, who has the largest budget allocation at $24.9 million, works on priorities and planning, communications, and longer-term macroeconomic policy advice, and also runs the Aboriginal Affairs Secretariat. The Deputy Secretary for Machinery of Government ($8.1 million) is charged with protecting "constitutional integrity" in all government activity, and also runs legislation and House planning divisions.

From there, the functions seem to divide into policy advice and services. In the former would be the Expenditure Review Secretariat, Intergovernmental Affairs, Global Affairs and Canada-U.S. relations, and the National Security Adviser. In the services category would be the Senior Personnel Secretariat and Special Projects, and the Corporate Services Branch, the latter supporting both PCO and the Prime Minister's Office (PMO). It should be noted that in addition to PMO, the five other ministerial offices and the PCO as a department, the PCO estimates also include "Commissions of Inquiry, Task Forces and Others" (e.g., the Policy Research Initiative), which total $8.5 million and 40 FTEs. This, roughly, is the organizational framework that supports and maintains collective government and the Prime Minister's capacity to be ahead of the agenda through the information flowing to the Clerk.

3.3.2 The Advice Function

The "Deputy Minister to the Prime Minister" title is also a way to indicate the scope of the policy advice role that the Clerk must play. The policy scope of the Clerk arises from the requirement for the Clerk to not only ensure that the Cabinet paper system is well managed and that ministers are well served, but also to achieve intellectual mastery of the content of current files and thus provide advice as required to the Prime Minister. One can recall that it is the PM's prerogative to move into any other Minister's portfolio. Issues flow in not only to Cabinet from ministers, but also to the Prime Minister from the Prime Minister's Office.

It is important to be clear that Government is *properly* a political activity, that the Prime Minister's Office is a co-adviser of the PM, and that the two streams of advice must be reconciled. There are almost daily morning meetings of the PM, his Chief of Staff, and the Clerk, and often there will be telephone calls during the day. Topics could include updates on ongoing issues, including decisions to consult; conversations about emergent issues and who should take them on; and second thoughts about whether to bring a departmental initiative into the Cabinet process. Further, there are weekly scheduled meetings among the units within each organization that work on similar policy. Assistant secretaries heading the various divisions in PCO meet with PMO policy staff, and deputy secretaries with the relevant staff from the offices of the Deputy Prime Minister and the Prime Minister.

For more substantive issues, the Clerk's advice to the Prime Minister will be in the form of formal memoranda. These are, ideally, responded to in writing by the Prime Minister, typically by initialling the document to indicate it has been seen, and initialling recommendations if they are accepted; and sometimes by providing marginal notes, issue by issue. The PM might also reply to the Clerk in a return memorandum. The written exchanges are important because they constitute a core record of discussion and decisions on the most significant substantial matters; rationales can be recovered and reviewed. The Prime Minister's attentiveness and response time to the Clerk's advice is important to the Clerk's capacity to maintain the quality of the Cabinet processes itself. An attentive Prime Minister creates direction and purpose, enhancing senior officials' opportunities to bring relevant information forward and creating shared momentum. Everyone in Government is familiar with the phenomenon of a "window of opportunity" created for a policy change by political interest in an issue—a Prime Minister who keeps the Cabinet system moving opens such windows throughout the system. If a Prime Minister prefers verbal communication on even very significant subjects, failing to respond in writing to the Clerk's memoranda, the result can be confusion over what direction is intended, with the Clerk believing one version and the Chief of Staff another. Vagueness and confusion can sometimes even open discussions to the participation of people who may have no right to participate. Therefore it is important that the Clerk and the Prime Minister find an early balance between written records that can prevent circularity and increase efficiency in their own way, and the creativity of verbal communication.

3.4

Canadian Head Role

3.4.1 Creation of the Title

The role, Head of the Public Service, became a formal responsibility of the Clerk of the Privy Council in 1993, with the proclamation of the *Public Service Employment Act* that had been amended in 1992. The relevant clause in the Act states only that the Clerk of the Privy Council and Secretary to Cabinet is the Head of the Public Service, and that the Head should provide to the Prime Minister an annual report on the Public Service of Canada. There had been little previous discussion of the provision, which was said to be an Act that recognized practice and the status of the Clerk. A former Clerk of the Privy Council had said in 1989 that the Clerk in fact performed the "Head" function without the title.[28] It seems clear from the brevity of the establishing clause and from the lack of duties and resources attached to the role that it was never intended to be an executive function.

A description, "Responsibilities of the Privy Council Office," posted to the PCO website in 2001, says the "Head" role has the following components: advancing the Government's management agenda with emphasis on reform; ensuring strategic management and planning of the careers of senior public servants; acting on occasion as the spokesperson for the public service; and providing the annual report. In contrast, the terms of reference for the present paper describe a role with only two facets:

> In the first [of the Head's roles], representing the Government to the public service, the Clerk must make clear what the Government wants in terms of policy proposals and administration. In the second the Clerk must express the concerns and needs of the public service to the government.[29]

This two-sided formulation is clearly compatible with the first and third elements of the above list. The question expressed in the terms of reference is whether these two roles are compatible; and if they are not, must the second role suffer—"expressing the concerns and needs of the public service to the Government"? The formulation assumes that the Head of the Public Service is in a position of a dual loyalty—to the public service as a whole and to the Government of the day—where the two loyalties should be equally intense and should be served with equal intensity.

I have been unable to find in the British literature any such "Janus" formulation of the Head role. The closest parallel is seen in the British civil servant who serves each Minister as his or her Private Secretary.

In the latter case, "He [the civil servant] must explain the demands of the department to the minister and the political needs of his minister to other officials."[30] (The Private Secretary is an early-warning line for the Minister.)

The Canadian document, "Responsibilities of the Privy Council Office," suggests that the motivation for creation of the "Head" role was for some reason needed to provide greater moral legitimacy to the Clerk's seniority or desired range of functions in the public service:

> Because of the Clerk of the Privy Council and Secretary to the Cabinet's primary role as chief non-political adviser to the Prime Minister and the responsibility for the overall effectiveness of the Public Service's support to the Ministry, he or she has traditionally been regarded as the Head of the Public Service. As the senior Deputy Minister, the Clerk of the Privy Council and Secretary to the Cabinet has the combined responsibility both for the overall effectiveness of the Public Service and for its competent and efficient management and administration. Recognizing the fundamental importance of leadership and accountability in the Public Service, the statutory acknowledgement of the Clerk of the Privy Council and Secretary to the Cabinet as Head of the Public Service was included in the Public Service Employment Act in 1993.[31]

The specific activities that assist the Clerk in gathering information and disseminating it are many and varied. The Clerk convenes gatherings of deputy ministers at weekly breakfasts, monthly lunches and semi-annual retreats. He or she chairs several committees of deputy ministers, including coordinating committees. The Clerk also has a statutory duty to serve as Chair of the Board of Governors of the Canada School of the Public Service, formerly known as the Canadian Centre for Management Development.

Overall, in the rationales presented in 2001 for the addition of the title, one senses a degree of indecision about whether the Clerk and Cabinet Secretary's mandate was broad enough to meet felt needs without new authority.

3.4.2 Clerk's Role in Deputy Head Appointments

The Clerk is directly responsible to the Prime Minister to provide support for Deputy Head appointments made to the core public service by the PM under the prerogative, by Order in Council. In Canada, the Clerk has played this role *as Clerk* from the beginning. (In Britain, on the other hand, advice on senior appointments was always provided by the Head of the Civil Service, a title that has belonged to the Cabinet Secretary only since 1981, when the Cabinet Office acquired the full complement of the civil service's personnel-management functions for all levels that had previously been held in the Treasury.)

In Canada, "The Responsibilities of the Privy Council Office" set out work in senior appointments:

> The PCO supports the Prime Minister's power to recommend appointments by providing substantive policy and management advice on certain senior appointments, including the appointment of deputy ministers and heads of agencies. As the senior Deputy Minister of the public service, the Clerk of the Privy Council monitors the effectiveness of the support provided to Ministers by their departments, and makes recommendations to the Prime Minister when departmental or agency capabilities require reinforcement.[37]

In this senior personnel work, the Clerk chairs and is advised by the Committee of Senior Officials (COSO). It is composed of several senior deputies, plus the Secretary to the Treasury Board. Feedback on persons being promoted is sought from a standard list of sources, such as performance agreements and annual appraisals.[13] The information base for this system covers appointments of departmental deputies, heads of Crown corporations, and other agencies and bodies. COSO may also have several advisory groups, such as one on executive compensation. Nevertheless, COSO does not and perhaps cannot run an accountable process. Much depends on the self-restraint of the Clerk for not pushing loyalists or known entities, and for permitting the process to operate as well as it can.

At present, the Secretariat for Senior Personnel and Special Projects supports the Clerk on appointments, as well as working on all other Order in Council (OIC) appointments. It has one of the smallest budget allocations in PCO, at $4.9 million. With some exceptions, Deputy Head appointments are made from among assistant deputy ministers in the current public service, augmented by a few former public servants recruited back into public service from other positions. These people are known entities to COSO, as their progress will have been followed from their entry into executive ranks by the senior community. Identifying future Deputy Minister (DM) potential constitutes, however, an unknowable portion of the work of the Senior Personnel Secretariat, because the Secretariat must work on large numbers of other appointments—from heads of agencies to chairs and members for the boards of Crown corporations and other arm's-length bodies. Estimating perhaps too generously, the DM group could occupy on average a third or even less of the full-time equivalents employed in Senior Personnel, estimated at about 30,[14] assisting the Clerk in his or her senior personnel work, depending on COSO's schedule and contingencies. These officials would include the four or five senior managers in the Secretariat, who would be most current on the movements of deputy ministers and other senior people.

For a period in Jocelyne Bourgon's clerkship, left intact while Mel Cappe was Clerk, the Senior Personnel Secretariat added "management priorities" to its name, and the top official eventually advanced to the position of Deputy Secretary. When Alex Himelfarb became Clerk, however, the management priorities function was dropped, the rationale being that Treasury Board managed the public service. At the same time, the position regained its traditional rank as Assistant Secretary to the Cabinet.[35]

On the one hand, Mr. Himelfarb's action seems to remind us that Treasury Board dominates human resource functions. Treasury Board Secretariat (TBS), for example, is the employer, manages numerous personnel policies (e.g., pensions) and the collective-bargaining process; the new Public Service Human Resources Management Agency oversees the management (training, development, recruitment) of the Assistant Deputy Minister community, in almost all cases the pool from which deputy heads of departmental organizations are drawn, as well as the rest of the Public Service. Exercises like La Relève, led by Jocelyne Bourgon as Clerk in the mid-1990s, when they are undertaken by Clerks, are done by leveraging the assistance and resources of departmental deputy ministers. In contrast, PCO seems continuingly reluctant to abandon a claim to human resources management. In 1999 Mel Cappe took the lead for launching the first Public Service Survey of employees, and the Clerk annually publishes his or her priorities on the PCO website: those for 2005-2006 are "management for results, *human resource management*, representation and learning." (The PCO website content also endorses Treasury Board Secretariat's list of criteria for assessing the performance of managers, the Management Accountability Framework as it applies to performance management.)

3.4.3 Other Senior Personnel Duties

One of the problem-solving duties of the Clerk is set out in the document "Guidance for Deputy Ministers," found on the Privy Council Office pages of the Government of Canada site under publications. It addresses the accountability relationships of a Deputy Minister, and speaks directly to the role of the Clerk as a mediator.

The opening section of this document is called "Multiple Accountabilities." The wording of the document is so careful as to make an attempt at a summary foolhardy, but the gist is that many strands of accountability come from the Deputy Head's duty to support the Minister in his or her individual and collective responsibilities. Other accountabilities are derived from the Deputy Minister's own position, in which she or he must meet requirements set out in the powers, authorities and responsibilities in various statutes, as well as in policies, guidelines and codes. This section closes with the statement that where "the required balance" between accountabilities cannot be maintained, *or in any matter the Deputy feels significantly affects his or her own accountabilities, those of their Minister,* or the agenda and direction of the Government, "the Deputy Minister should consult the Clerk of the Privy Council [emphasis added]."

The Prime Minister's prerogative in appointments—the same in Britain and in Australia[16]—is said in the document to emphasize the collective interest of ministers to work with the Prime Minister to realize the Government's plans. The accountability of the Deputy Minister to the Prime Minister that arises in recognition of the appointment reminds the Deputy Minister to keep in mind the agenda and direction of the Government as a whole as he or she provides support to ministerial priorities. The document states that if the Deputy Minister's "view of the correct exercise of his or her explicitly assigned powers may be inconsistent with the Minister's views . . . it is *of the highest importance that the Deputy minister give due weight to his or her own specific and directly assigned responsibilities under legislation* [emphasis added]." If a difference cannot be resolved, the Deputy Minister is to consult the Clerk and perhaps the Prime Minister. The final statement of the document is to the effect that if problems are of the kind that would affect the confidence of the House or interfere with the Government's ability to maintain its agenda, the Deputy Minister will want to add a visit to the Secretary to the Treasury Board. Thus the document provides clear guidance for officials who know they are having trouble balancing the Minister's wishes with formal requirements in their own roles; it addresses issues felt only by people who have seen and defined a problem.

As for recorded incidents of when a Deputy might have sought assistance from the centre, no examples are available in Canada. It is in the nature of executive studies that documentation is rare to non-existent. And indeed, the consultation provision is intended to solve conflicts before they become public. It is by virtue of the above provisions, the FAA clauses on the Deputy's duties in financial management, and the statutory duties of the Deputy Head as expressed in departmental legislation, that many senior public servants have publicly stated that the probity aspects of the UK Accounting Officer concept do in fact exist in federal Canada, even though the title is not used.

3.4.4 Privy Council and Subordinate Legislation

The work of the staff to the Privy Council proper, which now forms a small division in Privy Council Office, is centred on the machinery "by which advice is tendered to the Crown and emerges as a formal instrument."[57] It sounds like a sausage factory—and it is. Ministers originate submissions, and the Clerk of the Privy Council (Secretary to Cabinet) is responsible for their classification as either "routine," when they will be referred to the Committee of Council (any quorum of four current ministers); or, alternatively, as requiring policy, and therefore to be considered by Cabinet. Normal business is conducted by four ministers in committee, Council. Following meetings and the preparation of instruments, papers are bundled in subject clusters under a title page and sent in batches for the Governor General to sign or initial, which she or he does without being in the presence of the Committee. Therefore, the Governor General would not have heard or participated in, for example, the ministerial discussions through 2004 and 2005 on the *Public Service Modernization Act*—a significant set of machinery changes particularly in relation to human resources (personnel) management, constituting public policy, as set in motion by Order in Council.

Nevertheless, the outgoing Governor General as of September 2005, Adrienne Clarkson, revealed in the last days of her term that she believed she had fully exercised the traditional rights of the Monarch to "encourage, advise and warn" the Government of the day. She found, she said, that "[a] minority government does have a wonderfully clarifying effect on the mind." Explaining that, in Canada, minorities arise on a cycle of once every 25 years, she said that she was "really glad to have participated in one of those cycles."[38] The Governor General's website states that the Governor General meets "regularly" with the Prime Minister and his ministers.[39]

4 The UK Cabinet Office and Cabinet Secretariat

In 1916, David Lloyd George created the Cabinet Office and Secretariat and the position of Cabinet Secretary. Most important at the time, a War Cabinet with committees was struck, and procedures were developed that would later be generalized to Cabinet proper.[40] (Until that time, the record of decisions of Cabinet had consisted of a letter from the Prime Minister to the Monarch.) The modernization of the British Cabinet Office thus preceded the Canadian reforms by almost a generation. At time of writing, Cabinet was composed of 23 ministers leading 22 departments of state. This number includes, as self-standing departments of state, the Cabinet Office, the Department for Constitutional Affairs, the Office of the Deputy Prime Minister, and individual offices for Scotland, Wales and Ireland, as well as a Privy Council Office constituted as a Department of State.[41]

4.1
Minister of the Civil Service

In Britain, the contemporary Order of Precedence of Ministers presents the Prime Minister as First Lord of the Treasury and Minister for the Civil Service, the first title being ancient and without function.[42] The Prime Minister has been Minister of the Civil Service since the creation of the Civil Service Department in 1968, and the ministerial mandate therein was unaffected by the Department's 1981 demise and thus does have function. As Rodney Brazier sets out, the post gives the Prime Minister wide powers in relation to the civil service. In addition to the statutory powers, the basic regulation of the civil service, Brazier notes, rests substantially on the royal prerogative. This is because Britain does not yet have a *Civil Service Act*.[43] The full swath of the prerogative has not been used since the mid-1980s, although, according to Peter Hennessy, Prime Minister Blair has a master plan based significantly in prerogative powers to essentially revolutionize the core civil service, which he reaffirmed in 2004. Blair intends to see

> a smaller strategic centre; a civil service with professional and specialist skills; a civil service open to the public, private and voluntary sectors and encouraging interchange among them; more rapid promotion within the civil service and an end to tenure for senior posts; a civil service equipped to lead, with proven leadership in management and project delivery; a more strategic and innovative approach to policy; government organized around problems, not problems around Government.[44]

The strategy underlying public service reform in the United Kingdom was set out in March 2002 in a document, "Reforming Public Services: Principles into Practice." This states the methods or means by which goals will be achieved: setting national standards for public services; devolution and delegation, to give local leaders responsibility for delivery; flexibility in responding to needs and in challenging red tape; and expanding choice or allowing for alternative suppliers.

The Prime Minister makes appointments to the two top levels of the senior civil service (permanent heads of departments and deputy permanent heads) on the recommendation of the Cabinet Secretary acting as Head of the Home Civil Service. The Cabinet Secretary also has direct responsibility to the PM for the delivery and reform group and propriety and ethics issues in the Cabinet Office, and attends Cabinet.

4.2
Cabinet Secretariat

While it is housed in the Cabinet Office, the Cabinet *Secretariat* in Britain is organizationally distinct from the Cabinet Office. The Secretariat's status is emphasized as being "non-departmental in function and purpose."[43] It serves the Prime Minister and those ministers who are chairs of committees, and, for chairs, only to support that role. The Cabinet Secretary and Head of the Civil Service has direct responsibility and is answerable to the Prime Minister for quality of work by the Cabinet Secretariat proper. Within the Cabinet Secretariat, there are four primary secretariats and two specialized secretariats. In the first group are Economic and Domestic Affairs; European; Defence and Overseas; and Civil Contingencies. In the second are Ceremonial, which looks after the Honours List, and Intelligence and Security, which has a broader mandate than the other units. Each Secretariat is a separate management unit with its own support staff. Among other duties, they work with the ministerial private offices. Only Cabinet Secretariat officials attend meetings of Cabinet or committees.

In Brazier's words, the secretarial functions are as follows: (a) to compile the agenda for the Cabinet (under the Prime Minister's direction) and for Cabinet committees (under the direction of their chairmen); (b) to summon members to meetings; (c) to take and circulate Cabinet and Cabinet committee minutes, and to draft reports of those committees; (d) to circulate memoranda and other documents for the Cabinet and its committees; and (e) to file and maintain Cabinet papers and minutes.[44] The Cabinet Secretariat Site emphasizes the close links between the Secretariats and "Number 10": "These [links] are needed in the planning of business and to ensure that the Prime Minister's views are taken into account, particularly where business will not come before Cabinet or a Cabinet Committee which he chairs."

4.3

Cabinet Office

According to the Cabinet Office website, the goal of the British Cabinet Office, as a full Department of State represented by a Minister in Cabinet, is to provide a strong centre for Government, working closely with the Treasury and the Prime Minister's Office. If one includes the Prime Minister's Office (fewer than 70 persons), the Cabinet Office employs almost 2,000 people to assist in this effort of coordination and control.

The Prime Minister is, however, *not* the Minister for the Cabinet Office. He appoints another Minister to direct and take responsibility for the management of the Cabinet Office, and this individual sits in Cabinet as Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office. The Cabinet Secretary reports to the Prime Minister as Secretary and also reports directly for three important units in the Cabinet Office. The three Cabinet Office units reporting to the Cabinet Secretary are Coordination and promoting standards; Building capacity; and Managing the Cabinet Office. Interestingly, because the PM is not the Minister for the Cabinet Office as a department of state, the Cabinet Secretary cannot be formally identified as "DM [permanent Secretary] to the PM," and therefore does not serve as either permanent head or Accounting Officer for Cabinet Office. Instead, the official who leads the unit called "Managing the cabinet office," is, to quote, "Managing

Director, *Permanent Head of the Department and Accounting Officer* [italics added]."[illegible] The Permanent Head runs internal communications, all corporate services, internal audit, and a unit managing records and official histories.

The Coordination and promoting standards division is largely centred on security and intelligence and civil contingencies, government communications and a group of secretariats. These are devoted to Europe and defence, with individual secretariats for economic and domestic matters, ceremonial duties, and propriety and ethics. The Security and intelligence coordinator, who is at the head of this division, reporting to the Secretary of the Cabinet, serves as Accounting Officer for this area. Building capacity is about reform, modernization (including "e-Government") and regulation.

A number of political officers are attached to the Cabinet Office, among them Government whips in the House of Lords and the House of Commons, and a Parliamentary Counsel. The Minister for the Cabinet Office is also assisted by a Parliamentary Secretary and by the Labour Party Chair, who is also a Minister without portfolio in the 23-member Cabinet.

In conclusion of this section, it should be noted that the British Cabinet Office holds enormous powers in human resources management and in structuring the public sector writ large. To give a general idea of the importance of this department, if one removed the expenditure budget functions from the Canadian Treasury Board Secretariat, then added the whole of PCO to the human resources or personnel-management functions remaining, plus a general responsibility for regulation, one would still have less capacity to effect change or public sector reform than exists in the British Cabinet Office alone. In addition, the Cabinet Office works closely with Treasury on shared objectives, such as working with departments to help them meet their commitments and stay within fiscal rules.

4.4

Head Role

The Cabinet Office Departmental Report of 2005 provides a brief sketch of the Secretary of the Cabinet's role as Head of the Home Civil Service. As Head, this official is responsible for providing leadership to the Government's program of civil service reform, whose goal is to improve public services; and for the work of the Delivery and Reform group. (This takes in a strategy unit, the Prime Minister's Delivery Unit, and otherwise appears to be composed of subdivisions of the three main groupings of services in Cabinet Office.) The Head is also a member of the Cabinet Office Strategy Board, and looks after senior appointments. Parenthetically, there is no record that any annual report is required from the Head of the Home Civil Service in Britain, and it is clear that, in speeches and other forms of communication, the Head addresses the entire civil service.

Three years after the Cabinet Secretariat was created, the Prime Minister, David Lloyd George, created in 1919 the position, Head of the Home Civil Service. This role was first conferred on the Secretary of the Treasury, because the Treasury had responsibility for supervision of the civil service and oversight of the machinery of Government.[48] From the beginning, the Head had the responsibility to advise the Prime Minister on appointments to senior posts. As of the mid-20th century, the Head and Secretary to Cabinet looked after

> the sections of the Treasury responsible for the salaries and conditions of employment of all civil servants, for controlling the total number of staff and the creation of higher posts, and for dealing with general questions relating to training after entry to the civil service.[49]

And in the Treasury the Head of the Civil Service and Secretary remained until the Fulton Report of 1968 took issue with the Treasury's management of personnel. The report held that moving central management functions out of the Treasury into a new Civil Service Department was necessary before reform of the civil service could occur.

According to Kevin Theakston's account,[50] William Armstrong, appointed to the role of Head of the Civil Service in the Treasury, excelled beyond any other British Head in serving to lead and inspire the civil service workforce. Armstrong's performance earned him a place in the pantheon of great British civil service leaders. His term as civil service Head, which began in 1968, was situated in the brand new Civil Service Department (CSD), although he was appointed from Treasury. The British would feel strongly the tensions and extra needs for coordination created by having two central coordinating agencies in the personnel-management area—the Treasury and the CSD. For this reason, the CSD was eventually abolished by Prime Minister Thatcher in 1981.

Thatcher's public rationale in abolishing the Civil Service Department was that its existence isolated "central responsibility for the control of manpower from responsibility for the control of Government expenditure."[51] The shake-out, however, was that the Prime Minister did continue to hold responsibility for the CSD's personnel functions, the staff for which was settled into the Cabinet Office. At this point the move of the "Head" job to Cabinet Office appears to have become permanent, with Sir Robert Armstrong (no relation to Sir William), the Secretary to Cabinet, taking on responsibilities for personnel and management that came from Treasury via the CSD. Interestingly, in 1981, early in this shift, the time the Cabinet Secretary found he needed to devote to duties added from Treasury for the control of all civil service personnel was roughly estimated at between one-quarter and one-half of his working day.[52] Thatcher and Armstrong would appear to have used their new powers to "hive off" civil servants into executive agency forms. By 1994, three years before New Labour would take power, some 60 percent of the previous total of civil servants were working in agencies.[53]

The Thatcher governments also privatized. The government sold more than 50 major businesses, reducing state-owned industries by about two-thirds.[54] By some accounts the figure for civil servants currently in agencies or transferred to private sector bodies is as high as 80 percent. But generating a good head count is difficult, complicated by hiring increases to the civil service under Blair, and the winding up of some agencies. Whatever the figure, it is a lot, and the resulting fragmentation complicates accountability and coordination. As Bevir and Rhodes put it,

> [S]ervices are now delivered through a combination of local government, special-purpose bodies, the voluntary sector and the private sector. There are now 5,521 special-purpose bodies that spend at least £39 billion and to which ministers make 70,000 patronage appointments. This sector is larger than local government![55]

4.5

The British Privy Council Office

Operating behind the scenes, the Sovereign's powers are covered in the formula that she has "rights to advise, to encourage and to warn" the Government of the day. She also has a role in the selection of the Prime Minister, a qualified right to refuse a dissolution of Parliament, and reserve powers that would involve the rejection of ministerial advice. This is so far similar to the role of the Queen's representative in Canada.

The Sovereign and the Prime Minister have scheduled 30-minute or hour-long audiences on a weekly basis when Parliament is sitting.[56] This is a more intense collaboration than that of the Canadian Governor General and our Prime Minister. Another contrast is that the Queen *presides* in person at Privy Council meetings, and may require the requisite four ministers for a meeting of Council to travel to her secondary residences in the country if they wish to do business when she is on holiday, using at least a whole day of their time.

The Privy Council's major divisions include the Secretariat services provided to monthly or fortnightly Privy Council meetings, including advice on the use of prerogative powers and any functions assigned to the Queen and Council by act of Parliament; the Judicial Committee of the Privy Council, a collection of senior judges that considers constitutional cases and acts as a Court of Appeal for the former Commonwealth countries that continue to ask for its services; and a unit that provides support to the Leader of the House of Commons and his Deputy.

As in Canada, the Privy Council's business can include fundamental matters, such as transferring responsibilities between Government departments, or dealing with recommendations that touch the Constitution. Orders in Council transferred powers from ministers of the UK Government to the devolved assemblies of Scotland and Wales.[57] Nevertheless the Council's time would appear to be dominated by the evolving needs for amendments of the approximately 400 institutions, charities and companies incorporated by Royal Charter, and requests for variances from rules regulating statutory regulatory bodies and universities. The Council also formally invests certain members of the Church of England with their ranks, and generally looks after any variations required by Church commissioners.[58] The head of the Office is designated Lord President of the Privy Council and sits in Cabinet. The incumbent at time of writing is the Right Honourable Baroness Amos. She is also Leader of the House of Lords.[59]

5 Evaluative Components of the Canadian Clerk Role

5.1

How Have Successive Clerks Played or Understood Their Roles?

5.1.1 Annual Reports as "Head"

This section of the study discusses the manner in which Canadian Clerks have used the annual report—the major formal innovation in the Clerk's role since the 1940s. The section also provides a partial description of the implementation of the New Public Management (NPM) in Canada. Since Paul Tellier presented to the Prime Minister the initial Head of the Public Service's Annual Report on the Public Service, there have been 12 reports, including that for 2005.

The first annual report was preceded by a long history of reform in the federal public service, with a common theme: a shifting balance between centralization and control versus departmental and individual autonomy, an example of which is the assignment of personnel-management responsibilities to line authorities followed by attempts to hold line authorities accountable for performance.[60] The goals of reform under the Public Service 2000 (PS 2000) initiatives, the broad subject of Tellier's first annual report, were threefold: to simplify and deregulate the financial and administrative regimes in the public service; to decentralize central control to departments; and to back up delegation with more effective monitoring.[61] Following the 1984 general election, the new Conservative Government launched the exercise known as Program Review under the Deputy Prime Minister, Erik Nielsen. Nielsen's mandate was to consolidate or eliminate programs that were no longer needed, reducing administrative costs. The reduction would be $18.4 billion.[62] After 1984, there were more than a dozen successive reductions in departmental operating budgets, the "6 and 5" controls on wage settlements, and still another set of actions to reduce the numbers of the 400 separate organizational entities of the public service—plus reductions in the 500,000-strong workforce and the senior executive population in these bodies through early retirement and workforce adjustment programs.[63] Paul Tellier had led the modernization initiative under the general title of PS 2000. He assigned about 120 deputy and assistant deputy ministers to run 10 task forces on elements of the proposed reforms (Common Services, Classification, Compensation, Management Category, Budget Controls, Service to the Public, Staff Relations, Staffing, Training, and Workforce Adaptiveness).

Tellier

The first report by a Head of the Public Service was published by Tellier 1992. He discussed the outcomes of the various modernization initiative task forces, as well as key events and milestones in 1991 (wage restraint, a 10 percent reduction in the executive group, and the general strike by the federal public service). He outlined service improvements by some departments, examples of departmental consultations with Canadians, the creation of the new Executive Group, and increases at the executive level in francophone and female representation. The exercise to develop a universal classification standard (UCS) for public service positions, started under PS 2000, was flagged by Tellier as a critical reform component (the development of the UCS remains a priority in 2005).[64] Tellier also emphasized the importance of coordination and collective effort in other ways, initiating weekly breakfast meetings of deputy ministers to discuss emerging events and political priorities, and used the assistant deputy ministers' annual forum to communicate Government priorities to that population. He ended his report with a plea to employees to combat skepticism, and he asked that they commit themselves to the tasks of retooling.

Shortliffe

The second annual report skipped a year, appearing in March 1994, under Glen Shortliffe's signature as Clerk, covering his tenure as Clerk and Secretary to Cabinet. Shortliffe reviewed the context of government in which public services were being provided. The report is addressed to Mr. Chrétien as Prime Minister, elected the previous fall. Shortliffe importantly acknowledged the stress that the public service workforce was experiencing. He commented on the challenges presented by the 1993 reorganization begun under the previous Conservative Government. Thirty-five departments were reduced to 22 through amalgamations of their various components into 10 new departments; 17 departments were abolished; and there was some rationalization in the central agency complex (Federal-Provincial Relations Office was incorporated into PCO, and the Office of the Comptroller General intoTreasury Board Secretariat).[65] The departmental changes affected more than 100,000 employees and were put into effect through Orders in Council to create new shadow departments (until legislation was approved) and move the affected employees to them. The period also saw a reduction to Assistant Deputy Minister positions of nearly a fifth; the consolidation and significant downsizing of administrative support services; and the geographic relocation of some services.

The Program Review, which made a further 45,000 cuts across the public service, was quite separate from PS 2000. (However, by concentrating cuts on overhead services and services to management—internal audit, for example—there was some attempt to protect the service-improvement mood of PS 2000 with the cost-cutting of Program Review.) Verbally, Shortliffe reconciles the two initiatives by stating that the principles and values of PS 2000 have been endorsed by the new Government: "These include recognition of the value of skilled adaptable employees; a focus on service; and a commitment to continuous learning and innovation within organizations." Likewise, he says, the continual change of the time is shared by the United Kingdom, Canada, Australia, New Zealand, the United States and France as a result of global transformational changes. His characterization of the New Public Management's "common features," however, in my opinion, applies most clearly to the Canadian implementation: "greater flexibility in organization, investment in human resources, modernization of personnel systems, a commitment to consultation and a general openness to ideas from outside government."[66]

Bourgon

Jocelyne Bourgon, as Head, issued four annual reports to the Prime Minister, each of the first three (the fourth was a videotape) longer than those of her predecessors. Her second report, 57 pages, gave many examples of accomplishments and progress of departments and the public service workforce, and put restraint in the Canadian public sector into comparative context with other countries. Bourgon also reported on the launch of the program known in both languages as "La Relève," perhaps rendered most nicely in English as "renewal." Similar to Tellier, she mobilized a series of Deputy Minister-led initiatives to build the human resource base for the next 25 years. Bourgon referred to the human resource needs as "the quiet crisis," to attract, motivate and retain a public service that would match the quality of the past organization at its best. Her fourth and final report, in 1998, was a videotape and was not widely discussed other than for its format. With the PCO apparently abandoning its attempts to motivate servicewide reform initiatives, the reports necessarily had less material to draw on.

Cappe

Mel Cappe, the next Clerk under Chrétien, took a more practical turn with his three annual reports. Among his central topics were the contents of the Speech from the Throne, the results of the first Public Service Employee Survey, progress on bringing visible minorities into the public service, and Canada's security and other responses to the terrorist attack on the World Trade Center towers in New York. He had put a great deal of energy into preparing the Government for Y2K and its uncertainties in the information technology field.

> Himelfarb
>
> The present Clerk, Alex Himelfarb, holds the job in perhaps the most unquiet times since the inception of the annual report. At time of writing, he was serving a minority government with the most slender of margins for survival, one that survived a confidence vote on the budget by one vote—and that with the support of the New Democratic Party. His three annual reports average 10 pages. In the first, he attempted to raise morale. The second report marked the transition and took note of "setbacks." The report of 2005 talked about the culture of transformation. Thus the communication value of the annual report to the Prime Minister seems to have declined in significance.[67]

In the period immediately following the "Head" legislation, the annual report was more significant than now to the wider public service community. Familiarity with the Prime Minister and Clerk's thinking about policy that would affect the public service was limited to what could be learned from the general media; from unions; and from the Clerk's speeches to forums, including the Association of Professional Executives of Canada. More important, in the Tellier-Bourgon years, the public service was effectively being taken apart: who would not be interested in a Clerk's report? In addition, the last 10 years have seen a surge in the availability of basic information on government and current directions and projects on the official websites of all departments and agencies.

5.1.2 Clerks' Own Publications on Their Role

Clerks of the Privy Council in Canada tend not to publish.[68] Gordon Robertson was the last federal Clerk to provide a scholarly review of his job and his relationship with the Prime Minister's Office, a discussion that is imbued with sober democratic theory as well as idealism.[69] Paul Tellier in 1972 provided an insightful commentary on two articles in

Canadian Public Administration—one by Robertson on the PCO, the other by Marc Lalonde on the PMO. His remarks, however, are based on their texts and come well before he won the Clerk's job.[70] Michael Pitfield provided an interpretation of the whole policy-formulation system, but did not provide enough on the problems, which he would surely have understood.[71] Only two other Clerks, Bourgon and Himelfarb, have spoken for the record on their roles and behaviour, and have given their opinions of their office; but they did so under the constraints of specific lines of questioning at the Gomery Inquiry and cannot be taken to represent what they would say if they were to reflect in the same mood as did Robertson. Bourgon was put on the defensive by Judge Gomery, as was Himelfarb—although he had not been in a position related to sponsorship at the time of the events.

Robertson

Gordon Robertson stresses in 1971 the way in which the full use of Cabinet committees and the continuing development of the Cabinet paper system gives individual ministers more opportunities to participate and improves deliberation. Efficiency improved with the concession to committees that their decisions on matters would normally decide the issues. One problem he sees is that the intense participation of ministers in extensive collective government can come at too high a cost to their individual political roles.[72]

His article is most celebrated for his summary of the roles of the PCO and the PMO. The challenge and coordination work of the PCO, he notes, is "replete with possibilities for misunderstandings, bruised feelings and grievances," and therefore certain principles have developed. The first and one of the justifiably more familiar principles is that Privy Council Office must "stay off the field"—the ball stays with the departmental team and Minister who are to make the play. Perhaps even more engrained into the psyche of

Canadian public servants and scholars is Robertson's line between the PCO and the PMO: "The Prime Minister's Office is partisan, politically oriented, yet operationally sensitive. The Privy Council Office is non-partisan, operationally oriented and politically sensitive."[73] In this formulation, more an ideal to strive for than a formula to be implemented, Robertson points to a factor that some Canadian scholars and control agencies have difficulty accepting: government is and should be "political" because only politicians are accountable to the electorate. "Ideology, technology and bureaucracy have to be restrained so that politics may rule."[74]

Tellier

Paul Tellier's message in his 1972 article appears to be cautionary. He suggests that the Cabinet paper system might concentrate power in the centre as opposed to distributing power. He further suggests that a progressive slide of power toward the executive could alter the meaning of Cabinet solidarity, describing a body of guards around the Prime Minister rather than a group of colleagues.

Pitfield

Michael Pitfield's message was delivered in 1976 as a talk to the Annual Conference of the Institute of Public Administration of Canada, in the second year of his term as Clerk. In his opening remarks, he addresses how government writ large has changed—the rate of change corresponding to the speed at which government has grown. He then describes the process that he was still developing for "greater efficiency, greater effectiveness, and greater political control and direction"—anticipating in "better political control" one of the tenets of the New Public Management—as well as for accomplishing clearer definitions of objectives [of programs] and organizing programs more tightly around those objectives.[75]

> In thinking about Pitfield's enthusiasm for measurement in management, it is important to recall that Planning, Programming, Budgeting Systems (PPBS) were in his term of office believed across the western industrialized world to be a necessary reform of public budgeting, previously done only for "line items" that loosely defined categories of expenditure. Pitfield was not alone in believing that much better or even perfect management information could confer power on politicians. Politicians, it was thought, could seek to implement the doable parts of their political programs. So no one should feel superior to Pitfield on the grounds that he was not practical in his system-wide planning requirements. With a few changes in vocabulary—to program management, and to Management Accountability Frameworks (which include the PPBS standard of measured results)—his speech would not seem remarkable in any way to a contemporary group of senior officials.
>
> In this talk, Pitfield also speaks about the reasons for his rationalization of the Cabinet committee system and decision-making processes, mentions a number of crucial decisions of the day, and takes up the topic of implementation.
>
> One key decision was to increase the size of the Cabinet, to "opt for a larger political interface with the bureaucracy and the greater capacity to control and direct that it was hoped this would permit," thus avoiding a more administrative and quasi-judicial, a less political, system.[76]

5.1.3 "Quality" Journalistic Judgments

In addition to these sources on how various Clerks have interpreted their roles, the Privy Council Office website lists three quality magazine pieces: one by Christina McCall-Newman on Michael Pitfield,[77] serving Trudeau from 1975 to1982, less one year for the Clark Government; another by Charlotte Gray on Paul Tellier,[78] serving Trudeau and then Mulroney (1985-92); and Michel Vastel on Jocelyne Bourgon,[79] serving the Chrétien Government from 1994 to 1999. One receives the impression that Clerks have great latitude to shape their roles during their terms.

Pitfield

Pitfield had spent some time in the Privy Council Office in 1968, and Trudeau appointed him Clerk of the Privy Council in 1975, when Pitfield was only 37, to follow the elegant Gordon Robertson. McCall-Newman's article is a long psychological deconstruction of the man and (what she presents as) his failures in this position and as a human being. Her mismanagement argument is premised on her assumption that the technocratic system theory that Trudeau and Pitfield designed to force more deliberation into policy-making was, simply, far too impractical to work. The difficulty is that she never explains the nature of the problem with the initiatives. It is described as simple as "impracticality" owed to Pitfield's singular airy wrong-headedness, rather than as owed to corresponding thinking in the entire federal system of financial control, including the push from the Office of the Auditor General. Therefore, she does not explain that the hyper-rationalistic system was destined to be tried because it was in the zeitgeist, and destined to fail because of forces larger than any "mismanagement" by Pitfield. By their nature, so-called "comprehensively rational" decision systems fail because their information costs and time demands are impracticable. This had been established in the United States in the early 1970s. It had been demonstrated by philosophers in the early 1900s.

Nor does McCall-Newman place into the political context the Pitfield scheme to control the criteria for business coming to Cabinet. The Office of the Auditor General had created a political minefield for the Government in its long and public battle for what it presented as established and common-sense techniques for measuring program outcomes, methods it claimed were already perfected and in use in business. This was not true.[80] Pitfield perhaps primarily wanted to avoid mistakes and their inevitable scandalizing. The Auditor General of the day, J.J. Macdonell, actually went to the Canadian people in his 1976 annual report to garner the popular support he needed to enlarge his mandate. He reported simply that the Government was losing control of *financial* management. What he was asking Government for was an Act giving the Office broad powers to assess what he at that point called "Value for Money" results of programs.

The Treasury Board and its Secretariat also must have believed in the virtues of comprehensive-rational planning, because "the econometrics logic" of PPBS was implanted into the formal supply system in 1971 by using it as a format for the Estimates. McCall-Newman describes the Glassco Commission and its program to modernize and decentralize the public service, mentioning the "currently fashionable corporate business techniques such as . . . planning, programming, budgeting systems."[81] But, again, she does not explain that PPBS was intended to force departments to generate reliable information that would centralize system-wide "results" information in the hands of Treasury Board Secretariat, to be used by politicians in making expenditure-allocation decisions. It is important to realize that had PPBS been feasible, it would have counter-balanced the decentralization of decision-making that followed both the abolishment of the old comptrollership function in the TBS and the decentralization of powers to managers that followed on the Glassco Commission Report. Thus the egregious unfairness of McCall-Newman's conclusion: If you looked back over the decade, it was hard to escape the realization that much of this [depletion and demoralization of the public service] was Michael Pitfield's fault.[82] In reality, the "fault" was in a system of belief much bigger than Pitfield, one that intelligent people across the system accepted with far too little hard thought.

Tellier

Charlotte Gray's article of 1985 on Paul Tellier starts with the Privy Council Office as a shell "eviscerated" by Gordon Osbaldeston, who "replaced many of Pitfield's energetic protégés with managers who shared his more low-key approach to government."[83] Low key was now bad. Next, John Turner dismantled the two "ministries of state"—the Ministry of State for Social Development and the Ministry of State for Economic Development—which provided a first-stage Secretariat and challenge function, coordinating Deputy Minister and departmental thinking before Cabinet meetings in the British manner. As a third blow, the next Prime Minister, Brian Mulroney, stripped the PCO of its remaining policy analysis capacity and built up a substitute in the PMO. "By the fall of 1984 the mechanisms for policy coordination—for fitting Government decisions into the broader picture of the Government's general direction—had evaporated."[84] (Those mechanisms had been Pitfield's innovations.) The first Conservative Government appeared lost, losing ministers to a variety of personal lapses. Their mistakes included John Fraser's overruling of his officials at Fisheries, ordering the release for human consumption of canned tuna; although the tuna was not positively dangerous to human health, the officials had ruled it unsuitable for human consumption. This was apparently not the only episode in which ministers overruled their officials.[85]

Although Prime Minister Brian Mulroney campaigned for public office against the bureaucracy, famously threatening "pink slips and running shoes," the difficulties he experienced in his first years in power—with an inexperienced group of ministers and a less authoritative centre than had been run by Michael Pitfield as Clerk—convinced Mr. Mulroney of the importance of coordination run by professional public servants. Having seen Tellier at work, the Prime Minister appointed him to the Clerk's job.[86] In 1988, Mr. Mulroney found himself launching an initiative in 1988-89 to prepare the public service for the millennium, PS 2000. And in December 1990, in his preface to the Government's document on renewal, he acknowledged that, as Prime Minister and head of Government, "I hold a custodial responsibility on behalf of all Canadians to ensure the continued effectiveness of this great national institution."[87]

Bourgon

Michael Vastel's portrait of Jocelyne Bourgon is both cruel and crude in its misogyny. After the Charlottetown referendum defeat, Bourgon, then Deputy Head of the Federal-Provincial Relations Office, had a couple of years out of the centre as President of the Canadian International Development Agency and then as DM in the Department of Transport, before returning as Clerk, appointed by Prime Minister Chrétien in February 1994. Her leadership in the sacred corridors of power on the fourth floor of the Langevin Block, Vastel says, given her lack of an Ivy League education and her plain looks, was as unlikely as finding Mother Theresa presiding over a meeting of the Chase Manhattan Bank.

But then she takes charge, Vastel continues, and removes or displaces a dozen of the most senior officials, and shifts another 17 assistant deputy ministers to other positions. Mother Theresa was telling groups of officials that it "is a question of reinventing the Government of Canada [my translation]."[88] In what must be a phase of Program Review, but not identified as such by Vastel, Bourgon and Marcel Massé, Minister for Public Service Renewal, then grilled the top officials in Government on whether the programs they administered were necessary public services, whether they could be better delivered by the private sector or another level of government, how they could be more effectively delivered, and were they affordable. The reader feels back with rationalistic Pitfield. After this, more heads fall, parts of departments disappear, whole floors are emptied of government workers, and the mark of the good DM becomes that he or she can reduce by one half the personnel of his or her department. These moves were undertaken to reach Chrétien's and Martin's joint goals of simplification and restraint. In his own realm, Chrétien reduced the number of Cabinet committees and the number of ministers, the latter from 38 to 22.

Having depleted senior ranks, Bourgon switched gears to a renewal exercise called "La Relève." Vastel claims that Bourgon put the Committee of Senior Officials out of business, judging it too elitist. But he does not explain how COSO's function was replaced, or whether it was replaced simply by Bourgon's own preferences and judgment alone.[89] This is a serious allegation.

Just as he rounds out his article, Vastel comes out with an arresting formulation of an interview. Bourgon and Massé, the latter a "grand mandarin" under Clark, Trudeau and Mulroney, had by Vastel's account removed or driven from the federal public service the last of the people who embodied the old mandarin ethic of service and self-restraint. In Vastel's account, Massé states that the new generation of deputy ministers will not come into being by moving up from one grade to another in a systematic way. "Career profiles will follow the movements of the ideas that are being used to define the federal state [my free translation]."[90] The right person with the right talents will appear in the right place at the right time and be placed at the right level. This is again a form of systems theory. This time, the necessary people must and will emerge from the situation, the culture and the times. Here we find an open or organic system formulation, far in advance of any system humans can create. If one takes the Massé remark seriously, it would appear that planning for the future human resources to serve the machinery of the state was founded on a metaphor.

Regardless of its gaps, Vastel's quotation is not a bad summary of what seems to be the content of this review of what quality journalists think Canadian Clerks did with their roles and their powers. Clerks apparently react against what went before and dismantle it, they respond very directly to the Prime Minister with whom they work, they survive like chameleons in the political environment and the power balance in which they find themselves, and they drink in the ambient ideas of their time about management—ideas that lack content, or for which the content has not been tested.

Given what happens to a Clerk's reputation at the hands of even the quality press, the surviving former Clerks, several of whom are young and vital, including Bourgon, might be well advised to put pen to paper to describe and defend their own periods in office.

5.2
How Has the Clerk's Role Changed over Time?

The forthcoming sections are based on my own general reading and reflection, importantly placed in perspective by the interviews conducted for the study. What do former officials who were present in Government during much of the last 30 years believe has changed? And has the public profile of the Clerk or Secretary to Cabinet changed, and in what ways?

There is some belief that, at the start of the Pitfield period, there was a qualitative change in the difficulty of the organizational and coordination tasks that senior public servants are expected to accomplish. Pitfield spoke of a shift in the rate of change. Some of those interviewed noted that both the social and economic sides of government "exploded" in the late 1960s and 1970s. Nevertheless, most respondents said these forces have not continued to create fundamental change at the same rate. According to the remainder, in the 30 to 40 years since the major shifts, we have become more accustomed to living with the forces named by Sir Richard Wilson, a former Head of the Home Civil Service and Secretary to Cabinet: globalization, science and technology; changes in social attitudes, behaviour and the power of the media."[91] In addition, several respondents doubted that globalization was a permanent feature of life. Globalization requires continuous sources of cheap energy as well as a world at peace and almost totally devoted to trade—both conditions threatened since 2001.

5.2.1 Clerk as Prime Minister's Mediator

In relation to the Clerk's duties, the biggest single change interviewees identified was that the Clerk over the past 30 years has increasingly been expected to be a problem-solver."[92] This in turn leads to the criticism that the Clerk has been or is being politicized, particularly in that mediation may often involve close consultation with the Prime Minister's Chief of Staff.

One factor is that quality of personnel in the PMO is variable over time. If the Clerk outperforms the political office, then the Prime Minister naturally increases his or her requests for the Clerk's mediation. Political officers will be weaker in minority governments because of personal insecurity. Another factor, already remarked, is that the Clerk is at the centre of information networks in Government. The Clerk meets every morning with the Prime Minister and the PM's Chief of Staff. Thus the Clerk is already up to speed and can act quickly to minimize difficulties where he or she has leverage and believes the activity to be appropriate to the role. Further, it is not in the least improper for the Clerk to point out to the Prime Minister the partisan political consequences of a particular move, or to explain limiting administrative factors to politicians. This is in fact the Clerk's job.

Regardless of the availability of the Clerk's good offices, the incentive is for deputy heads to work out their own problems. The Deputy's job is to assist the Minister in accomplishing the priorities set out in a mandate letter and, further, to meet his or her own obligations.

5.2.2 Government Is Judgmental and Political

Nevertheless, starting before Robertson, which he and other officials have freely and repeatedly acknowledged, in the interactions between PCO and PMO, "no one knows where the lines are." The elected Government is politically led. Given the pace of ongoing work, plus the fact that "hot files" are continually breaking into the struggle for coordination and control and hijacking attention, it is not always possible to definitively allocate blame for particular actions that turn out badly. In the words of one interviewee: "Accountability relations in this area have always been nuanced." The political-official centre of the Government was not designed to routinely generate proof so individuals could be formally and fairly blamed for discrete acts.[43] This centre, after all, is the Government, an elected executive and its appointees who must work through the permanent public service via the Clerk's facilitation. The accountability system is found in Parliament. One can well believe that, after a period of observing that the centre is pretty much one entity, the British Prime Minister reached his decision to empower special political advisers to direct civil servants and assign tasks to them both at the centre and, now, in ministerial departments. Certainly this is a step too far for the Canadian political culture, and one that would cause great anxiety.

Of the forces that drive the Clerk role toward problem-solving, the interviews repeatedly turned up four other factors: the changing nature of senior public service personnel (the loss of solidarity of the old mandarinate that built the service); the associated diminishing respect for the public service as a whole, with many politicians believing that they achieve their policies in spite of the public service rather than because of it; the tendency in Canada for high turnover at general elections, which can bring in a group of MPs of whom as much as 60 to 80 percent can be new to politics, putting many first-time ministers into office; and the immediacy and complexity of media-Government interactions.

5.2.3 Can the Clerk Cope with "Invisible Problems"?

Many observers have seen Mr. Justice Gomery's inquiry into the activities of the Clerk in place at the time the Unity Fund was established, and the subsequent lack of corrective action, as proof of the ineffectiveness of the Clerk's information-gathering powers and of the value of recourse of deputy heads to the Clerk.

The Unity Fund was first established under the Prime Minister, and then moved to Public Works and Government Services Canada (PWGSC). Ms. Bourgon did write a memorandum about the fund's placement to the Prime Minister, Mr. Chrétien. In effect she advised that the fund should be placed within a department's management framework of rules and monitoring, rather than remaining under the PM's arm in a managerial vacuum that would leave him directly responsible. There the Clerk's intervention stopped, because, according to the evidence, nothing further of the Sponsorship Program was heard in the Privy Council Office. The PM did what the Clerk advised and this single sponsorship issue seemed to have been dealt with according to the Clerk's testimony.

The Deputy Minister of PWGSC, Mr. Ranald Quail, testified to both the Public Accounts Committee and the Commission that, after the sponsorship unit was set up in the department for which he was responsible, but with a novel status (he believed his Minister wanted to deal directly with Mr. Guité, the head of the sponsorship unit, directly), the unit's activity, in his own figure of speech, was no longer on his "radar." And why not?

The most likely answer is that *if* the program had been merely totally ineffective as opposed to having encouraged fraud, with the same loss, it would have been seen as a completely affordable political exercise. Under current risk management policy, which calculates the "materiality" of risk proportionately to a departmental account or to the accounts of Canada, the Unity Fund did not represent a large sum. Were the entire fund to disappear without value to the taxpayer, there was no risk that the accounts of Canada or even the PWGSC accounts would be qualified in a financial audit. The Unity Fund was, objectively speaking, simply too small a sum to be micro-managed by one of the most busy people in Ottawa—the Clerk—or even the Deputy Head of PWGSC. The Office of the Auditor General, despite the Auditor General's overdone reaction to findings from the invited 2002 audit of three contracts, had not once gone into the sponsorship unit on its own initiative and authority between 1996 and a sequel to the invited audit. Obviously, the OAG's dedicated PWGSC audit team's radar did not pick up on the sponsorship unit. The same can be said of Treasury Board Secretariat; and this, despite whistle-blowing and two rather poorly resourced internal audits that raised difficulties. If Mr. Quail's radar was defective, he was not alone.

It might be fair to say that the observer has two choices. One is to accept at face value the explanations given by the Deputy Minister of PWGSC and by Ms. Bourgon as Clerk, in effect that they were fully occupied by files where the risk to the public purse was greater or the public policy stakes much more important than with the sponsorship funds.[94] Alternatively, one might construct a hypothesis to the effect that the Clerk, the PWGSC deputy, TBS and the OAG formed a conspiracy to allow a destructive political scandal to run its course and, at the same time, ruin their own reputations. If one accepts the first explanation as being the more reasonable of the two—that the fund was minor in the context of the amounts dispersed in Government, and therefore it could be abused without senior management noticing—only then does it become possible to ask a genuinely significant question.

The significant question is whether risk management as it is practised in the federal government is sufficiently attuned to *political* risk as opposed to management risk assessed by margins of error tolerable in large accounts. What made these particular frauds scandal-worthy to the media, the Opposition and the OAG was the involvement of politicians—and the possibility that participating firms were making contributions to the Liberal Party. Therefore, it might be pragmatic for the political level to confer a duty upon Treasury Board to monitor political risk to lower the incidence of political scandals.

5.2.4 The Media Make the Message

The media can make difficult problems uncontrollable. Several persons spoke about the Meech Lake and Canada rounds of the constitutional crisis as clarifying the impact of the media as active creators of political events and outcomes. David Taras of the University of Calgary provides a scholarly analysis of the key events, his main contribution being an examination of how and to what extent television created an arena shared by the media and the politicians who transformed the Constitution-making process.[95] The basic argument is as follows:

> [T]elevision was not only the window through which political leaders conveyed messages to their public but was a vehicle for communication among the parties themselves. The media could be likened to the walls in a squash court [but in motion themselves]; negotiating positions would have to be hit against the media walls to keep them in play, test reactions and give them legitimacy.[96]

Politicians would react instantly to others' comments. They used interviews to float or stake out positions, "leaked" different information to different media figures, and lived with the media for weeks in a kind of pack, such that they would prepare individual statements for particular media figures. Taras uses the last day before the deadline for approval of the Accord as an illustration of a qualitatively new situation, as did several of my interviewees. This is the episode in which Premier Clyde Wells of Newfoundland, who was expecting a telephone call from Lowell Murray, the federal Constitution Minister, instead found himself watching Murray on television explaining what the federal strategy would be following the imminent vote in the Newfoundland House of Assembly. Murray's decision to use television instead of the telephone was in part a result of the fact that he was himself tuned in, watching developments in Newfoundland. Chantal Hébert found it astonishing to see this new kind of event: using live television to deliver an insult to a negotiating partner. Then, as one of my respondents noted, the next big thing was New Democrat MLA Elijah Harper, a First Nations Cree, holding a single eagle feather in the Assembly to signify that he would deny the unanimous consent in the Manitoba legislature necessary to keep discussions alive—believing that it was not legitimate for the federal government to address the Quebec question before the First Nations issues.

The basic message is that the way television is used in Canada will continue to transform political content and thus public policy in profoundly unaccountable ways. Not least important, Taras says, is the obsession among the journalists covering the constitutional events to declare winners and losers, as well as creating coverage favourable to their own constituencies and beliefs.

5.2.5 Clerks' Media Profiles over Time

Has a rising public profile made either the Canadian Clerk of the Privy Council or the British Cabinet Secretary more of a public figure, complicating the job? Lindsay Aagaard's search for mentions of the Clerk or Cabinet Secretary role in the Canadian and British papers of record, the *Globe and Mail* and the *Times of London*, yielded a number of points.

The search in the *Globe and Mail* archives is most usefully summarized for the period from 1965 to the present by saying that there is essentially no trend of increase in the general profile of the job as shown by increased coverage that is independent of the major events of the day. Clerks/Secretaries to Cabinet do not appear to be becoming "celebrities" in either Canada or the UK. That being said, the *Times of London* does give the Cabinet Secretary considerably more frequent mention than does the *Globe* in Canada. This is most clearly seen in a comparison of five successive Canadian Clerks (Tellier, Shortliffe, Bourgon, Cappe and Himelfarb) with, in the *Times of London* archives, three Cabinet secretaries, Butler, Wilson and Turnbull, in the same period. If one averages annual mentions of Canadian Clerks and British Secretaries, one finds that the British officials are mentioned about twice as often. If one looks just at the Canadian Clerks, one can see that the present Clerk, Alex Himelfarb, is getting just a few more mentions in the *Globe and Mail* than did his predecessors (if one creates annual averages). But the annual averages are totally misleading, because almost all the mentions of Himelfarb occur in 2004-05 and come from his appearances at the Gomery Inquiry. Every transition between governments was covered closely in both Canada and Britain, and this kind of event also makes counts peak in election years. Similar events also tend to drive coverage in both countries: whenever the Clerk or Secretary is tasked with establishing any kind of inquiry, for example.

Perhaps the most solid observation one can make on coverage of the Clerk and the Secretary to Cabinet is the difference in reporting style between the two newspapers of reference. Coverage in Canada seems to be considerably less neutral in tone. In the *Globe and Mail*, there is a tendency to denigration or snide language as part of negative coverage, while in the *Times of London* the language is more often neutral than negative, but nevertheless more often negative than positive. To illustrate, terms used in Canada might include variations on "PM's favourite," or "power broker," while the UK paper of record would identify the Secretary to Cabinet as the "PM's main civil service counsellor," or even, "interpreter of the Constitution." The *Times* is capable of praise in comparisons, as when one Secretary was said to be as skilled as some predecessor in arranging a smooth transition between governments. The *Globe and Mail* does not seem to see interest in comparing the performances of senior figures, or, more likely, most of its editorial floor staff would not have the necessary background. Finally, one can mention that, although both papers of record are events-driven, the *Times* will present considerably more background on the office and its responsibilities, putting the event into governmental and constitutional context.

In summary, it seems fairly safe to say that politicians in general are put to extreme tests by the media, but that in Canada the situation seems at least somewhat more difficult. The United Kingdom does have quality newspapers that take seriously their duty to provide background and interpretation, while English Canada does not have a national newspaper that would qualify as a quality paper in the British sense. Even our more careful papers largely fill their pages with material that would be somewhere between tabloid journalism and quality fare. (*Le Devoir* is considered by many as the most reflective newspaper in Canada, but it is published only in French.)

5.2.6 Newer Developments Such as Horizontality and New Public Management (NPM)

Among my interviewees, not one would agree that horizontality was new. They say that what is new is the particular emphasis placed upon horizontality, and its problematization in respect to narrow accountability—exactly which individual did what to what. In respect to the first new aspect, one respondent said, the injunction to public servants to think horizontally and to leverage resources is generally in use as a formula for asking public servants to think strategically. To most, horizontality should be understood as a simple necessity in Cabinet government as collective decision-making. There have always been a large number of departments in Canada in comparison to the United Kingdom. Given that we in Canada have more and smaller jurisdictions for a considerably narrower set of powers, horizontality as intense collaboration across departments has always been necessary to get things done in federal Canada. It is the Cabinet's job to provide collective government and to leverage resources from departments of interest.

Horizontality may even increase political control. To return to Pitfield, he believed that a larger number of departments would increase the density of the interface between politicians and public servants, yielding greater political control—a New Public Management goal before NPM. The Office of the Auditor General has, however, seen horizontal initiatives as a problem when shared resources are not formally contracted between participating departments and on occasions when it is not clear what share of responsibility each participating Minister should bear. (One respondent suggested that if a Cabinet decision to accomplish an objective using the resources and personnel of more than one department is seen to be a problem, then participating departments might consider the formal transfer of resources to a lead Minister, who would answer questions on the initiative in the House of Commons.) The British have largely pre-empted the problem because their system consolidates jurisdictions into huge departments run by one senior Minister who takes full responsibility for the involvement in different areas of a team of junior ministers. In many if not most initiatives, then, the necessary powers and resources will be found under one Minister. The alternative approach, introduced by the first Blair Government, is "Joined-up Government." In this strategy, a number of ministers participating in any exercise requiring authority from each of them would form a board. This board would then have a Secretariat to serve it, with personnel drawn from participating departments. A senior minister would answer questions. If more efficient organizational designs suggested themselves during the course of the exercise, the board could then recommend shifts of management units and personnel.

New Public Management was seen by interviewees as another matter entirely. One respondent summed up the Canadian implementation of this vague and shifting set of prescriptions as follows: our shift to a client focus in the 1980s jeopardized understanding of and attentiveness to the public interest; under NPM's "empowerment" prescriptions,"[97] Treasury Board Secretariat backed off, increasing risk, and so did the PCO's Machinery of Government, so as to not impede the emergence of "synergies"; and, finally, in the 1990s, the Public Service looked inward too much in a variety of initiatives, and at the same time placed the Program Review cuts in administrative areas like internal audit, which created new risks."[98]

Another respondent said that the New Public Management environment, with the Program Review cutbacks to audit and other overhead areas such as financial administration (including contracting), provided a background of "administrative laxity" that had not existed before. Public servants did not necessarily wish to operate in a situation of inadequate and infrequent rounds of control and monitoring. But this was the reality created for them: with smaller numbers of employees providing services, and fewer resources, they nevertheless had to deliver services politicians and senior managers had "protected" by concentrating cuts in administrative areas like internal audit.

Other interviewees made the point that "sponsorship misadministration came about from behaviour of individuals and not from badly designed structures. It [the sponsorship frauds] happened because a few people failed to act in accordance with rules they understood very well and had successfully applied throughout their careers." Further, another respondent said, it must be recalled that problems in the sponsorship unit were reported very early (1996) by a determined whistle-blower, followed by two internal audits that confirmed mismanagement. In short, the depleted and weakened internal audit service did its best to "work," but it could not get senior management's attention. The OAG did not come in to audit the unit under its own powers throughout the entire trajectory of misdeeds. The Auditor General had to be invited by the Minister, PWGSC (Don Boudria), in March 2002, to review three contracts, after which it formulated its own investigation in the context of a cross-departmental study.[99]

According to Bevir and Rhodes, the New Public Management is closer to a label than a philosophy. The common trends identified in the literature identify six main changes relevant to British Government: privatization, marketization, corporate management, decentralization, regulation and political control.[100] Bevir and Rhodes, however, explain that NPM refers most properly to a focus on management, not on policy, and on performance appraisal and efficiency (although privatization and marketization are surely policies and not simply instrumental choices).

Characteristically, according to one of Christopher Hood's first mappings, probably most applicable to the Anglo-American democracies other than Canada, NPM means or meant disaggregating public organizations into single-purpose agencies that deal with one another on a user-pay basis: "the use of quasi-markets and contracting out to foster competition, cost-cutting and a style of management that emphasizes output targets, limited term contracts, monetary incentives and the freedom to manage."[101]

These trends do not accurately describe the Canadian reforms under the label. Political control was being increased well before NPM emerged on the scene. Corporate management in Canada was not well realized. For instance, several interviewees said the Treasury Board Secretariat's program, Modern Comptrollership, was not explained clearly by the TBS, was not taken up by PCO in a helpful way, and thus was not well implemented.[102] In addition, there are the intractable intellectual problems preventing demonstrable measurement of accomplishment of results under this name or any other, including the current label "strategic outcomes." The general result is that strategic outcomes are "measured" without reference to a standard unit of measurement (there is no metric). Therefore, the strategic outcomes cannot in logic close the accountability loop on Government's accountability to the House of Commons for its granting of supply to Government. Supply is granted in dollars, and accountability is measured in confusion. This in turn cheats Opposition politicians of opportunities to express themselves clearly on the Government's policy record, forcing them to rely on the Office of the Auditor General as an authority figure. The British Government tends to work with targets, which are more immediately measurable than Canada's vaguely hopeful "outcomes."[103] Some privatization and marketization were pursued in Canada, but not on the scope of British action.

In Canada, decentralization was pursued under restraint; responsibilities hitherto met by the federal government were cascaded down to lower levels of government, but without adequate resources; and there were some major reorganizations creating what are called the legislated agencies, a larger bundle of Special Operating Agencies, and new forms of corporations as with NavCan. As already discussed, Canadian federal NPM was mingled in application with the 1993 reorganization, and with the 1995-96 Program Review cuts; empowerment and risk-taking were the gloss put on restraint measures. It cannot be said too often that issues of control and risk, importantly including the amount of risk created for the political leadership, were not thought through systematically. As an example, the contract is the mechanism that is, in theory, supposed to compensate for both privatization and decentralization. In NPM theory, privatized and decentralized bodies would be constrained by the terms of their contracts to keep producing all the public "goods" the political actors wanted to create more efficiently .Yet contracting capacity in the federal government was not systematically built up to prepare contracting as the new control.

In the NPM context, regulation internal to government covers the operations of organizations that shape the behaviour of other units by their own demands. Among these bodies are organizations like the OAG and the several small bureaucracies attached to or part of the House of Commons, such as the Commissioner of Official Languages, the Privacy and Information Commissioners, the Public Service Commission, the Ethics Commissioner and the departmental ethics officers. Christopher Hood and his colleagues show that the regulators in Government are not "corporate," meaning they do not coordinate their initiatives, no one regulates the regulators, and, strongly related, no one computes the totals for public money used in complying with regulatory slogans that provide few or no operative standards before the fact.[104]

The federal New Public Management reforms in Canada have been assessed by David Cooper and Ken Ogata, two senior professors from the School of Business at the University of Alberta. They structure their observations around an assessment by Pollitt and Bouckaert that Canada suffered "a significant implementation gap with many initiatives failing to meet anything like their full expectations."[105] Essentially, Cooper and Ogata conclude that the concern with and dependency upon the OAG of the Canadian media and Opposition undermine the possibility of the reform initiatives that emphasize managerial autonomy and empowerment. On the rare occasions when reforms had been deemed successful, they took place in the context of a "real or imagined fiscal crisis." Further, they concur in an interviewee's characterization that over time the federal OAG has functioned as a "pseudo-Opposition." The political culture in Canada is such that the "most influential and damaging Auditor General reports have dealt with . . . basic issues of stewardship and accountability, rather than weaknesses of results-based management."[106]

Given some of the Canadian initiatives billed as NPM—"results" without methods, empowerment without rules and controls, risk-taking without monitoring—we should probably be quite glad that our NPM petered out in so many directions. The degree of fragmentation in the British state, according to Bevir and Rhodes, now constitutes a situation that may have gone beyond the possibility of coordination. It was, as indicated above, Blair's expressed intention in 2003 to blur the boundaries between state, private sector and civil society. But neither the private sector nor civil society can be dismissed by the electorate, which makes the question of democracy moot. The basic question is: to the extent that the form and products of the public sector cannot be affected, directed, controlled or coordinated by elected representatives of the electorate, in what sense can one say that a democracy exists? There are the beginnings of a pro-bureaucracy movement.[107]

5.2.7 What Can Be Done to Ensure the "Chain of Accountability"?

Gordon Osbaldeston contributed significantly to Canadian public administration in research and publications, but did not write about his own clerkship. Instead, he looked into the role of deputy ministers, detailing the pressures that impinge upon them and creating a complex web of multiple and blended accountabilities.[108] He did *not* see a "chain of accountability" operating upward through the top levels of the service, ending with the Clerk. He saw professionals balancing the contents of their complex mandates such that their balance and powers could be recognized by a committee of their peers.

5.2.8 The Many Hands Problem

Richard Mulgan likewise does not believe that there is a crisp and fair approach to designating the persons who will bear what is sometimes called "sacrificial responsibility" for outcomes described as mistakes or failures. Although the public and the media want ministerial resignations even for very general kinds of institutional failures, Mulgan returns to the principle that blame and punishment should follow personal responsibility for an action or inaction. In most cases of institutional failure, he says, "the fault is . . . widely dispersed and usually includes systemic failure in the institution's structures and procedures which are the responsibility of many different people (the so-called 'problem of many hands)."The problem with *many* hands, with everyone having had a finger in the pie, is the following:

> In such a situation, the aim of punishing all those who are involved appears impractical and unreasonable and often results in everyone escaping comparatively unscathed, thus frustrating accountability.[109]

Nor is one on morally sound ground in designating the senior person involved. In Mulgan's words, "[I]t requires the application of criteria for personal blame well beyond those enforceable in a court of law or current in normal moral discourse. . . . their own personal involvement is often too remote and indirect. . . . enforced resignation is often too drastic a penalty. . . ." Mulgan's conclusion is that "The problem of allocating personal accountability for collective failure . . . remains morally and politically intractable."[110] Although Mulgan does not say so, his arguments shore up the convention of collective responsibility, which rations resignations and "accountability," as the best moral choice when many hands were involved. Similarly, where public servants have been working in good faith and under the direction of their ministers to collaborate to bring some result about, and the enterprise ends in public failure, the much-mooted idea of "direct public servant accountability" to House of Commons committees does not seem to be a morally defensible option.

Likewise, Charles Polidano, a well-known student and practitioner of public administration, composes the abstract of his article dealing with multiple accountabilities in Westminster democracies as follows:

> Politicians and public servants are commonly depicted as being in a unilinear power relationship. However, senior officials are subject

> to accountability relationships with various central government authorities in addition to ministers. Multiple accountabilities can work at cross-purposes and prevent bureaucrats from complying with ministerial directions, however legitimate these directions may be. One aim of recent public management reform has been to do away with some of these accountabilities. But they have only been replaced by others. Multiple accountabilities are an inescapable part of the reality of government.[111]

Polidano continues to define ministerial responsibility as it operates in Britain and in the other Westminster democracies, for, as he says in a memorable sentence, it is a model that "shrouds wide," reconciling a million discrete actions taken under many authorities in the names of ministers. The whole is made democratic and acceptable to the electorate under the answerability of ministers to Parliament for *the action they take to put departmental errors right* [emphasis mine]."This answerability for remedies is at the core of ministerial responsibility and/or accountability. Blame and retribution are not the core mechanisms of Westminster Government. The core is that change in state procedures should be completely under the control of elected officials so that the electorate, when push comes to shove, can have a shot at changing the policy provisions that cause discomfort.

The bureaucratic apparatus of the state, excepting Order In Council appointees, is, to be sure, articulated with the purpose of restricting the range of actions of lower-level incumbents to the contents of their role or job descriptions. Employees perform a role that they do not own or define. The task of the supervisor is to ensure that subordinates maintain direction and focus, even though their work may proceed on several fronts. There is no single "chain" of work moving forward, one project at a time. Very little would be done if people could not multitask legitimately. The "chain" of effects only comes into being in diagnostic exercises established to find what went wrong after the fact, and in complex situations it represents something like a model.

Weberian theory as prescription was developed to decrease uncertainty in administration, making it more predictable and even more prudent. Gajduschek asks: “If efficiency is crucial for the prevalence of any organizational form, and if bureaucracy is inefficient, how could it [bureaucracy] prevail?”[112] The answer, of course, is that in governments improved predictability is more valued than is efficiency, because, among other benefits like equal access to justice, predictability in performance makes it more possible for politicians to exercise directive control and thus achieve their policies. Even in business, predictability is a primary concern and its achievement is sought by bonuses and performance rewards.

The “chain of accountability” is, according to my interviewees, much more properly a description of the political or power links between the various principal actors—from public service, to ministers, to the House of Commons, to the electorate. And this topic is beyond my remit.

On the topic of increasing the Clerk’s directive power over DMs, all persons interviewed were convinced that giving the Clerk an explicit disciplinary role would jeopardize this community’s willingness to support the Clerk. In one respondent’s words: “The Clerk is a mediator without the power of an arbitrator.”

All respondents agreed that DMs do not serve the Clerk—they serve their Minister. The mechanism of their appointment is, for the most part, far from their minds, partly because so few DMs outside the centre ever have occasion to see the Prime Minister in person, and because each DM provides the Clerk with the information that allows him or her to do the work of advising the Prime Minister. It is a trust relationship, and when trust fails the Clerk will dwindle in stature, if not overtly fail. At the same time, “the Clerk is overwhelmed by transaction costs,” so the Clerk’s time and attention must not be abused. Most respondents said that they had never once felt themselves as an inferior in a "reporting" relationship to the Clerk. They respected good Clerks, and felt so much personal tension when someone they believed wholly unsuited to the job of Clerk was appointed that several had left the public service, asserting their personal independence.

5.2.9 The Accounting Officer Reform in Canada

None of the respondents believed that the Clerk should become an Accounting Officer in the British mode. The Accounting Officer mechanism—assuming that the Deputy would serve as Accounting Officer—seemed to block the possibility of trust developing between Minister and Deputy, thus allowing the Deputy to assist the Minister in achieving his or her policy mandate. Some believed that the Accounting Officer mechanism in the United Kingdom was in large part responsible for the politicians' increasing recourse to special advisers. Needing someone with whom it would be safe to brainstorm, a Minister would bypass his or her Deputy Minister/Accounting Officer until it was time to talk about implementation.

Interviewees also explained that the consequences of the Accounting Officer mechanism would be different in Canada. In Britain, both the Public Accounts Committee (PAC) and the National Audit Office (NAO) work coolly and deliberately, the NAO conducting forensic audits, expecting to find a certain incidence of fraud and to undertake long pursuits of those responsible. In Canada, in contrast, fraud is seen as a hot potato and handed off to the RCMP, which has few resources, and is forgotten as quickly as possible. It is therefore difficult to learn about systemic management weaknesses that are wide open to bad faith in federal Canada.

Further, under the provisions of the Accounting Officer mechanism, respondents reasoned, a financial dispute between a Minister and the Deputy Minister would have such high stakes that the provision would be inoperable. The Deputy's task under the provision, according to the

PAC Chair, would be to write a letter to the AG, who would then pass the letter to the Chair of the Public Accounts Committee. The Chair has said he would in turn circulate the letter to the media. Faced with the choice of instigating a disproportionate reaction from Opposition and media, a Deputy Head might well prefer to bow out in silence. Either strategy—turn over one's Minister to media frenzy or resign in silence—ends the Deputy's career. But silent resignation constitutes a form of protest and allows the individual a sense of personal control.

Next is the issue of monitoring deputy heads. To manage the detailed performance of the complement of deputy heads, the Clerk would need, in the estimation of several interviewees, a minimum of 500 employees—greater than the number who had worked in the program branch of TBS at its peak. In the words of one interviewee: "Clean government is not a free good."

Overall, respondents had two sets of views on accountability as driven by the sponsorship events, one being system risk and the other being political risk. The first was summarized as follows by two interviewees: "The existence of fraud through all of time has never been sufficient justification for building a system that will *prevent* theft. Absolute prevention of theft means a police state." A recommendation was to "set the level of risk you can tolerate and work to it like a target. Make the risk level high enough to caution a potential offender, and low enough that the inspection system is affordable and can work at the appropriate pace."

The other view was that risk created by senior public servants but borne by politicians is not taken into account in appropriate ways. "Fraud is the response to risk created by management," one respondent said. Management is particularly likely to create risk for politicians without considering the significance of what it is doing. If political risk were properly taken into account, officials would think through the risks of, for example, contracting by ministers in their offices. They would suggest that a body like Treasury Board might create an oversight mechanism for use of funds by the political actors and by Order in Council appointees dominating small offices such as the Privacy Office, all of whom have much to lose.

In summary, respondents believed that the root problem of sponsorship had not been rules and structures, but the behaviour of certain individuals. Thus they were against the Accounting Officer concept, in large part because, in the light of the Canadian scandalizing culture between media and the Office of the Auditor General, "it is like setting a fire in an oil refinery." But they did also want to see a measure added to performance appraisals that could reduce ambiguity and put on record an extended exchange over any potential ethical problems between the Clerk and a Deputy Minister. The provision could also reduce the possibility of voluntary compliance based on misunderstanding.

6 Canada and UK Cabinet Offices Compared and Contrasted—Can One Import Reform?

6.1

Prime Minister Prerogative Powers

The Cabinet secretariats at the centre of the two governments share some features, primarily in regard to the importance of the respective Cabinet paper systems. But the Cabinet offices, apart from the Secretariat duties, have very different kinds of powers. Most notably, the British Cabinet Office holds the powers over personnel management that are, in Canada, situated under Treasury Board. And many of the British Cabinet Office's powers flow from the Prime Minister's prerogative in the area of making policy to define the civil service. There is perhaps a point that should be made early. Documents the British Government places on the Web to explain Government to citizens state clearly that the " civil service as such has no separate constitutional personality or responsibility [from the elected Government]."(11) To the extent that this lack of personality in the British system is based in the country's lack of a *Civil Service Act*, it is unclear whether we in federal Canada—myself included—should continue to claim that our public service is equally without a constitutional personality: the Canadian public service is described in several statutes, and some of them assign specific responsibilities to particular offices.

In strong contrast to Canadian practice, the British Prime Minister can unilaterally implement major change. For example, in 2003 the British Prime Minister, in an intendedly progressive[114] June 12 reshuffle of his ministers, effectively abolished the office of the Lord Chancellor and replaced him with an individual charged with the duty of disbanding that function. As one of the Lord Chancellor's duties was to serve as Speaker of the House of Lords, the Prime Minister in the same act left the Lords without a Speaker from one day to the next. At the time, in the words of the *Guardian Weekly*, "an astonished shadow home secretary" said:

> To remake constitutions on the hoof, on the basis of personnel changes within the cabinet, is the height of irresponsibility. To announce it in a press release at 5:45 p.m. on a Thursday evening is nothing short of a disgrace.[115]

Blair's act brings to the fore the lack of a written constitution covering the relations between the judiciary, the executive and the legislature.

What appears also to be an interesting difference in practice is that, in Britain, departmental officials do not attend Cabinet or its committees while, in Canada, practice is looser. In Canada, the Clerk and the Deputy Secretary Plans, the Deputy Secretary Operations, and an assistant secretary and an analyst from Plans will attend Cabinet to take notes and to keep abreast of what may be expected of them. The PCO officials do not speak unless the PM asks a direct question, when the Clerk will respond. If important issues are on the agenda for a given department, the Deputy Minister and any other Deputy Head from the Minister's relevant portfolio agencies will attend to answer questions. In Britain, in contrast, only Cabinet Secretariat officials can attend.

The two practices are longstanding. Gordon Robertson takes brief note of it, as it was in 1971, and explains that the British depend on interdepartmental committees of officials for preliminary work and for policy recommendations. Canadian ministers, in contrast, "prefer to hear at first hand the differing views of senior officials from whatever departments may be involved. . . . Interdepartmental committees may have to be relied on rather more in future, but the valuable blend of ministers and officials at committees will undoubtedly be retained."[116]

Each country's arrangements for ministers assisting the Prime Minister in the Cabinet Office or Privy Council Office are also quite different. The British Minister who oversees the Cabinet Office (excluding the Secretariat) is there to assist the Prime Minister in providing *political* control to the overall management of the Cabinet Office and its areas of deliberation, research and action — to lessen the workload of the Prime Minister. The Canadian ministerial complement attached to PCO, on the other hand, appears assigned to specific and substantial policy functions — security, intergovernmental affairs and official languages.

6.2

Special Advisers in the UK: Bringing Policy to Administration

Another observation on the different use of power in the two centres is that some of the British Prime Minister's special advisers were exercising executive powers over members of the permanent civil service in the handling of intelligence leading up to the Iraq war. This was brought to light by the Hutton Inquiry. Following an enquiry on how this situation was possible, an official from Cabinet Office's Propriety and Ethics Team replied:

> The Order in Council to which you refer is the May 1997 Order. This provides for up to three special adviser posts in the Prime Minister's Office to have executive powers, giving them the authority to manage and direct civil servants. Only two of these posts have ever been filled: those of the Prime Minister's Chief of Staff and, until earlier this month [September 2003], the Prime Minister's director of Communications. The Prime Minister has accepted the recommendations of the independent Review of Government Communications (see http://archive.cabinetoffice.gov.uk/gcreview/for more details) that it is no longer necessary for the Director of Communications to have these powers. They have therefore not been conferred on the new Director of Communications.[117]

This order "provides cover" only to the PM's special advisers. Other ministers can also have special advisers, and there is no limit on their numbers other than in the ministerial code set out by the PM. This document provides that each Minister can have two special advisers, but that the number can be increased with permission. The total figure generally floated is about 80. Advisers are chosen by the relevant Minister and can include acknowledged experts. All are paid from public funds.[118] The issue of whether special advisers in ministers' offices can advise and direct civil servants is, for the time being, at issue.

As recently as July 2005, the Committee on Standards in Public Life twice formally objected to Government recidivism in the matter of special advisers.[119] In June the Government amended the legislation on the role of special advisers—the Civil Service Order in Council—through the Privy Council, but without debate in Parliament or even providing the content of the Order to Parliament or making any public announcement. On July 21, the Government responded to the Committee's first note of July 19, but without taking any of its concerns into account. The Chair then was left with no recourse but to repeat the Committee's concerns expressed earlier about changes to the Code of Conduct for Special Advisers as proposed in May: that the Prime Minister could be seen as strengthening the mechanisms by which personnel could be recruited to the civil service outside merit-based hiring arrangements (because in the Order advisers were described as providing "assistance" rather than "advice," which could be interpreted quite differently); and that special advisers could now "request" work from civil servants, which the Committee sees as being the same thing as "to commission" work from civil servants. Thus, on the Commission's reading of the Government changes, special advisers were effectively being placed in the hierarchy of the permanent civil service. The discussion ends as of time of writing, with the Commission promising to continue to press for the passage of a *Civil Service Act* as a way of providing parliamentary oversight.

In summary, the role of "special advisers" to politicians, classified as "exempt staff" and managed in a separate employment regime in Canadian ministerial offices, is quite different in the two systems. One can be sure it would have been a florid scandal in Canada had Mr. Justice Gomery uncovered an Order in Council giving the former Prime Minister's or any other Minister's Chief of Staff the right to provide direct orders to permanent officials or had Mr. Pelletier told Mr. Gomery that "this is how it works" (he did not). Overall, in Canada there is considerably more emphasis placed on the politics-administration "moat" between persons hired under different personnel provisions. While relations between staff in Canadian ministerial offices and their public servants are cooperative and friendly, public servants hired under the *Public Service Employment Act* who are not senior executives decidedly would not expect a great deal of informal contact with ministerial staff and certainly would not expect to receive orders from them.

6.3

Permanent Private Secretaries to Ministers

In Canada, there is no Permanent Private Secretary, the civil servant in Britain who serves every Minister, including the PM. The Private Secretary is not a check on the Minister in the way envisioned by the "Accounting Officer" reform. Instead, he or she is chosen from among civil service high flyers to provide advice and insight on business crossing the Minister's desk. He or she is in fact a decoder. Quite probably, the public servant serving in the Minister's Office as Private Secretary is able to alert a Minister to the dangers of a proposed course of action at such an early stage that his or her presence would be the reason for the relatively minor number of confrontations between ministers and their accounting officers.[120] In other words, it may be that the Accounting Officer reform should not be taken on board in Canada without first looking into whether the Principal Private Secretary serves as a significant first line of defence to protect ministers and reduce political risk.

6.4

Terms of Office

The terms of office of the nine Clerks of the Privy Council since the early 1960s are found in Appendix A at the end of this study, with comparative statistics for the United Kingdom and Australia. British Cabinet Secretaries have tended to arise from lengthy high office in major departments, and to have a proven ability to build comfortable relationships with their peers and politicians without being pushovers. They also tend to spend longer in the Cabinet Secretary role, and for that job to be their last in the civil service proper. The terms of the last six Cabinet secretaries have averaged just more than seven years since 1963, with terms being considerably longer at the start of the period—Burke Trend serving ten years, from 1963 to 1973. Since New Labour came in, Richard Wilson served four years, and Andrew Turnbull, who came up against mandatory retirement rather soon after his appointment, was in the post for three years. Also since 1963, there have been nine Clerks of the Privy Council in Canada, with two long-serving Clerks at the start of the period: Gordon Robertson spending 12 years as Clerk from 1963 to 1975; and Michael Pitfield spending close to eight years, from 1975 to 1982, his service broken by Marcel Massé's one year of service to the Conservative Government of Mr. Joseph Clark. If one removes Robertson, Pitfield and the other Clerk who lasted well, Paul Tellier, the remaining five Clerks (not counting Alex Himelfarb, who is still in office) have served for an average of 2.8 years. In this group is Jocelyne Bourgon, who was Clerk for five years for Mr. Chrétien. While one could not quarrel with the career success that led Canadian Clerks to this highest office, it is a different kind of candidate than the type who took the British office before New Labour—candidates whose elevation could not, and would not, be taken with a grain of salt by their peers. Canadian Clerks also tend to take the office at a point in their careers when they will want to go on to another challenging position. One suspects the job is simply so demanding of time that youth is necessary to survive it.

The formal descriptions of the two Cabinet paper systems are similar, as one could expect. As already noted, most observers tend to accept that, at the moment, the British working of their system is mutable and somewhat unpredictable, but largely in relation to the current Prime Minister's tendency to bypass the formal decision-making systems. The Canadian system does not seem to change much other than in committee structures, depending on the Prime Minister. It is unknowable whether a Clerk can unilaterally restructure PCO, or if the changes made are in response to a PM's preferences.

6.5

The Political Minefields of Imported Reforms

There are some other contextual factors that increase accountability in the British context, but one cannot overemphasize that these provisions do not surely prevent all dubious contracts, payments to political parties, or deals that bypass the powers of the accounting officers. British government is no stranger to scandals, and it is fair to say that in Britain a whiff of scandal does not, in the famous phrase, frighten the horses in the street.[121]

These accountability factors that seem to be quite superior in Britain would include:

- *Chairmanships* of the British House of Commons committees are allocated according to the seats held by the parties in the House of Commons. In Canada, only the Public Accounts Committee (PAC) has an Opposition chair.

- The British House has established a Civil Service Committee that can look into matters of any scope affecting the civil service and thus serves as a brake on prime ministerial and central agency unilateralism. There is no such committee in Canada.

- The British House of Commons has established a Liaison Committee that calls the Prime Minister periodically to account for the influence exercised by appointees who work under his direction. There is no such committee in Canada.

- The British Government under Prime Minister John Major established in 1994 a continuing Committee on Standards in Public Life. See the 10-year evaluation of this committee at the end of this study (Appendix B).

- The British Treasury has explicit policies on fraud in Government and publishes annual reports on fraudulent practices and on its efforts to recover funds. These keep fraud awareness in the minds of civil servants. This is not a policy in Canada, where we are nevertheless subject to important frauds[11]). The British Public Accounts Committee is non-partisan in working style, makes its own choices among approximately 50 reports tabled annually by the National Audit Office (NAO), and its Chair and other members are the primary interlocutors of the media on topics of probity. The media closely follow the Committee's assessments and interpretations of NAO reports. The NAO provides factual interpretation to the media in the neutral reporting language recommended to its members by the International Organization of Supreme Audit Institutions. In contrast, the Canadian Public Accounts Committee is, and always has been, highly partisan, while the media's principal relationship is with the Office of the Auditor General (not the PAC) and with the Auditor General. In Canada, the OAG uses dramatic language in its reports, which it tables three or four times a year. Because of its great powers, the OAG sometimes functions as a central agency of government in creation of management policy, which is counter to responsible government.

- The British Comptroller and Auditor General heads the NAO. Incumbents are appointed from the senior ranks of the civil service and hold office until retirement. In contrast, since the early 1970s, Canadian auditors general are appointed from the private sector. They freely interpret the provisions of the 1977 *Auditor General Act*, which defines the Auditor General as auditor of the accounts of Canada, the accounts being of course produced annually. Successive auditors general have decreased the amount of annual financial and compliance audit they perform, particularly in departments, in favour of operational-type audit that is essentially similar in nature to internal audit. Further, since the tenure of Mr. Macdonell ended in 1974, Canadian Auditors General simply ignore in their choice of subjects for narrative or operational audit Annual Report chapters their Act's requirement that their accountability work should at least concentrate on the accounts for the year of the supply cycle that has just passed.

- The National Audit Office's proportion of expenditure on traditional financial or probity audit versus its expenditure on "value for money" audit is almost precisely reversed in a comparison with Canada's Office of the Auditor General: the NAO spends a much larger portion of its budget on traditional audit. In addition, its "value for money" studies (which exclude policy evaluations) preponderantly arise from qualifications placed by the NAO on the financial accounts of a department or agency; therefore, they start with a problem. The NAO takes the PAC's suggestions and those made by another House Committee, the Audit Commission, into account, and so its approach to auditing government entities is more structured than in Canada, and its timeliness is notable. Finally, the NAO's reports are superior in quality to those of the OAG, in part because its work is sometimes guided and always vetted by an external panel of academic subject and methods experts. At present, the panel or standing committee on quality is from the London School of Economics. In comparison, the OAG sends chapters for review to individuals who work separately and are paid by the piece.

7 Recommendations

7.1

Theme: Modernize the Canadian Clerk's Role

One thing on which everyone interviewed—including people who had served as Clerks—agreed, is that the role of the Clerk of the Privy Council does not require augmented powers over other officials. The extent of the Clerk's power to *impose*, as opposed to negotiate and influence, is and should be subject to restraint, of which self-restraint is probably the most important element given the discretion inherent in this job in the very centre of the politics-administration interface. A Clerk with augmented authority over other officials would be ever-more tempted to move to action by his or her leveraging areas of authority. Clerk-championed reforms in Canada tend to be intrusive and exhausting for the already overcommitted deputy community. Clerks must "franchise" projects, because the Clerk does not have extensive program powers or personnel. Overall, leveraging or "championing"-cum-leadership initiatives lead to artificial enthusiasm and reforms composed only of elements that *can* be leveraged. They do not seem to inspire well-reasoned initiatives whose probable effects have been carefully considered and for which institutional insurance has been put into place. For example, there is no excuse for loosening rules and at the same time removing internal control capacity, as was done following program review.

- *Add explicit probes to the Clerk's script for annual Deputy Head appraisals with the purpose of ensuring that deputy heads communicate their ethical worries to the Clerk, and, reciprocally, ensuring that the Clerk clarifies to the Deputy Head his or her own views. The conversation would be captured in a note and signed by both parties. The purpose is to avoid anticipatory silence and anticipatory compliance by deputy heads, and to ensure that the centre is forced to know about "sleeping dogs" or submerged problems.*

The proposal, which three-quarters of interviewees enthusiastically supported, is that the appraisals exercise could add probes into areas which are not explicitly covered. For purposes of discussion, the Clerk could ask deputies what worries them on the ethical front, what worries them on the management front, and what worries them in their relationship with their Minister. Other questions could be added to handle any possible tendency toward anticipatory compliance by the DM in any "grey area." The Clerk could ask the Deputy, for each main topic, to state whether he or she believes that the *Clerk* has either a policy or a preference on any sensitive file, and what that is. A summary would be produced, signed by both participants. The result should be fewer surprises on both sides.

- *Abolish the Clerk's "Head" Role, and create the ministerial title: Minister of the Public Service, for the President of the Treasury Board.*

It is an obvious conclusion that the President of the Treasury Board is the effective head of the public service. The Canadian Treasury Board has all the personnel powers that led the British to appoint one of the Treasury permanent secretaries as Head before the British Prime Minister became Minister for the Civil Service. Only after the acquisition by the Prime Minister of that title and powers did the Secretary to the Cabinet become the Head of the Civil Service. In short, in Britain, the Head role is co-located with management authority over human resources. The Clerk of the Privy Council is not in a position to express "the concerns and needs of the larger public service workforce to the Government," because his or her personnel duties are limited to providing advice on appointments made under the prerogative, a tiny fraction of the public service. To quote C.E.S. Franks: "The formal responsibilities for personnel administration in Canada, unlike Britain, have virtually excluded the Prime Minister, the Privy Council Office, and the Prime Minister's Office from a major role."[123] Again drawing from Franks, it seems fair to say that Canada and Britain could hardly have taken more different routes for management of personnel, the Canadian path excluding the PCO, and the British path eventually concentrating personnel-management powers in the Cabinet Office. For many years, the elected Government in Canada had virtually no power over the Civil Service Commission except for appointing the commissioners. Overall, the powers held by the Commission were those of the British Treasury. In theory, the Commission was responsible to the House of Commons, but House committees tended not to work in a dedicated manner for public interest goals, putting partisanship first.

In great contrast, as discussed above, in Britain the Prime Minister is Minister for the Civil Service, holding the powers conferred upon the former Minister for the Civil Service Department (CSD), which was abolished in 1981. These powers, which came from Treasury to CSD, were thus placed operationally into the Cabinet Office, where they remain. In addition, to this point, the British government has no *Civil Service Act*. Thus, Mr. Blair, like Mrs. Thatcher, will have completed many of the so-called New Public Management (NPM) reforms in Britain under the kinds of powers now held by our Treasury Board, augmented by prerogative powers flowing from the fact that many great departments of state had their origins in the royal household and thus have no statutory basis. Thus, the British Prime Minister and Secretary to Cabinet are not limited to a moving company, although they, too, have such a firm at their command. They can, exaggerating only a little, start at the first day of creation in rearranging government—remodelling mountain ranges, oceans, rivers and lakes as they deem appropriate.

Partly in response to the elected Government's inability to manage the public service directly, Canadian politicians created a rich collection of non-departmental agencies to pursue public policy purposes. By the 1960s, Franks says, the civil service outside the Civil Service Commission's control was almost as large as the one it managed.[124] (In this sense, Canada had an NPM public sector before the term was invented.) Since the Glassco Royal Commission, there have been more than 40 years of efforts to reform personnel administration and strengthen its legislative base. As of 2004, the new *Public Service Modernization Act* has resulted in the President of Treasury Board having responsibility for a portfolio of agencies to "pursue an integrated management agenda for the Public Service."

The current Treasury Board proper is variously called the "general manager," "employer" and management board." The portfolio centre is the Secretariat (called central agency and budget office in the Report on Plans and Priorities for 2005-2006). The portfolio bodies are the new Public Service Human Resources Management Agency Canada (PSHRMAC) and the amalgamated training function now called the Canada School of the Public Service (formerly the Canadian Centre for Management Development, Training and Development Canada, and

Language Training Canada). With the advent of PSHRMAC in December 2004, the Public Service Commission (formerly Civil Service Commission) is restricted to recruitment, audits and investigations, plus policies on merit, partisanship and representativeness. It had already delegated most of its powers in staffing to departments. For the time being it still appoints the members of the higher public service, known as the Executive, or EX, group, but this will change when the amendments to the *Public Service Employment Act*, incorporated within the new *Public Service Modernization Act*, come into force in December 2005. Deputy heads will take over delegated authority to appoint EX-01 to EX-05 officers, with the exception of EX-level appointees to ministerial staffs.

Changes to the *Financial Administration Act* (FAA) range from formal to substantial, with about 20 new lines of text on "human resources management" responsibilities added to that Act. A formal change is the new section 7(1) (e), removing the phrase "personnel management" and replacing it with "human resources management." The more substantial changes are elaborated on the PSHRMAC website. These relate to the human resources management powers of Treasury Board and deputy heads for the "core public administration" or permanent public service as detailed in the schedules (I, IV). Section 11 includes ten responsibilities for Treasury Board (for example, human resource planning, classification, pay determination, travel expenses, equity, wrongdoing and harassment policies, and terms and conditions of employment). In section 12 are found six responsibilities for deputy heads (training, awards, discipline/penalties, and termination of employment). These changes were in place as of April 1, 2005.

Given that the President of the Treasury Board now controls human resources management functions, it seems reasonable to give him or her a second title, Minister for the Public Service. There is a formal precedent in Canada for a Minister to head the public service. Minister

Massé in 1995 held the title, Minister Responsible for Public Service Renewal. Deputy prime ministers have executed the functions without the title. Indeed, the President of the Treasury Board, given his leadership of the Secretariat, of the new human resources management agency(PSHRMAC), and of the amalgamated Canada School of the Public Service, is already the *de facto* Head of the Public Service. Further, under section 12.4 of the FAA as amended in November 2003, the President is obliged to report annually to Parliament on the administration of human resources, a report that could be modelled on the annual reports of the first three or four heads. It would therefore appear appropriate to behead the Clerk.

- *Another title that should be removed from descriptions of the Clerk and Secretary to Cabinet's role is the informal one:"DM to the PM."*

The Prime Minister gained no appreciable powers when he was designated Minister Responsible for the Privy Council Office, because the Prime Minister already holds the prerogative to act within any other Minister's portfolio and leads Cabinet by virtue of prerogative powers. The Clerk and Secretary to Cabinet thus has, without the "DM to the PM" publicity, the duty to support the Prime Minister in his or her understanding of the structures and status of administration and policy implementation in all departments of government. In short, the "DM" title is redundant. In addition, there is a lack of restraint in brandishing the title. It seems to imply an unlimited power acquired through access to the Prime Minister. As one interviewee said, Gordon Robertson, as a kind of gold standard as Clerk, would have been offended to be called "DM to the PM."The Clerk is before anything else the guardian of the system of responsible government, which includes Cabinet government.

- *A final title change could be the change from Clerk of the Privy Council to Cabinet Secretary, a more modern and understandable title.*

The Privy Council is the collection of all living persons who have been ministers of the Crown. The active part of the Privy Council is a committee whose quorum is four ministers that meets to pass subordinate legislation, subject to the signature of the Governor General. The title, Clerk of the Privy Council, implies that the Clerk's main duty is to serve the latter organization. Likewise, Privy Council Office as the Cabinet Office should be renamed as such. The small unit serving Council could become something like the Privy Council Secretariat. Although this is a minor and cosmetic change, it would assist the Canadian public — increasing numbers of whom are first-generation immigrants — to develop an understanding of this important role and organization. It would be the beginning of a response to Richard French's complaint, cited in the first lines of this paper, about the lack of intelligibility in the way the Canadian political institutions are presented to citizens.

7.2
Theme: Buttress the Integrity of the Centre

- *The seniority of the Clerk in relation to other deputy heads should be linked to his or her role as the final guardian of conventions of the Constitution and the machinery of Government.*

The Clerk is responsible for machinery of Government. Given the centrality of organizational arrangements and the relationships that obtain between actors, someone has to be responsible to assess the constitutionality and prudence of reforms. Public sector reform is public policy like any other, as important as health or education, and even more important because reforms can bring about qualitative changes to what "can" be done under a particular system. Therefore, reforms must be thought about against standards of prudence, reversibility, institutional insurance (whether one has the resources to reverse the reform and repair the damage), and a number of other standards that would serve the interest of the Canadian people and ought therefore to be of foremost concern to their representatives in Parliament.[175] As guardian of the regime and Constitution, the Clerk is truly senior.

- *Canada should consider whether to create a permanent Committee on Standards in Public Life, similar to that established in Britain in 1994, known at that time as the Nolan Committee. (See Appendix B at the end of the study for an assessment of its first ten years.)*

The Prime Minister of the day, in announcing the permanent Committee on Standards in Public Life, dubbed it an "ethical workshop called in to do running repairs."[176] The idea of conducting repairs as a system reveals its flaws is pragmatic.

The UK Committee on Standards in Public Life is an advisory non-departmental body sponsored by the Cabinet Office. Less cumbersome and expensive than a Royal Commission, lighter, broader, faster and cheaper on any cluster of topics than a judicial inquiry, the Committee is able to identify its own issues and concerns in relation to the conduct of any group in public life—Britain having a unitary government and belonging to the European Union, this scope can be allowed—and to make any recommendations it deems appropriate. In Canada, such a Committee, adjusted to the federal jurisdiction, could help educate MPs, House committees, the media and the public about the Constitution and our representative institutions. It would also introduce the idea of vigilance in respect to institutional development.

- *The Commission should remind politicians that they can reduce political risk by establishing a self-governing mechanism—perhaps run by Treasury Board—to conduct random audits of contracting in ministerial offices as well as random audits of small-budget organizations overlooked by the OAG, and by this means reduce political risk.*

Canadian federal politics are increasingly "character politics," where the Opposition and the media challenge the moral fitness of governments to govern, as opposed to challenging policies or ideologies.[127] Events that can arguably be construed as scandalous are reconstructed as narratives on haphazard collections of facts. The deal offered the Government by media and Opposition in return for allowing the House to function is that a targeted Minister must resign. Resignation confirms "guilt" and, also, the Opposition and media's construction of events. Refusal of resignation by the Government confirms its amorality. Yet ministerial responsibility is much more important than this "shooting gallery" approach indicates.

In each Government there will be several ministers who have little or no previous experience of Government. In each Government, particularly in the light of the huge size of Canadian cabinets, there will be some ministers who lack judgment or a sense of self-restraint in relation to available perquisites. Among the political appointees to head small agencies, there will be some individuals who will abuse their budgets and expense accounts. Therefore, it seems appropriate that Treasury Board as the group of ministers should be responsible for establishing deterrence against political missteps. One idea might be to compile lists of all contracts entered into in ministerial offices, then choose from among the census of contracts a random sample that would be audited by Secretariat officials. The mere provision would act as a deterrent to poorly judged behaviours. Each quarter, non-departmental entities could similarly be selected by random sampling for review. The government would be seen to be in charge of its own performance. Individual ministers with doubts as to the possible perception of a proposed contract could ask the Treasury Board for an approval. To address the high turnover of staff in ministers' offices, mandatory training in the *Financial Administration Act* and contracting rules could be offered to any staff who might want to initiate contracts.

Treasury Board ministers could report periodically to the Prime Minister, disclosing cases where exceptions had been granted for particular ministers or Order in Council appointees. The Treasury Board reports should ensure that events are considered within the fiscal year. The ideal would be to put to rest issues of fiscal probity in relation to particular ministers in the year or year after the actions were proposed or taken. The Government would characterize itself by its corrective action, which is how responsible government is intended to work. The Office of the Auditor General might be inspired by Treasury Board's timeliness to conduct more of its own work within the supply cycle of the House of Commons.

- *Devise a version of the British Accounting Officer provision to prevent clashes over potentially illegal or clearly unwise expenditure by ministers.*

The Accounting Officer convention appears to be useful in Britain because of its context: a non-partisan and public interest-oriented Public Accounts Committee; National Audit Office legislation forbidding the Comptroller and Auditor General from commenting on government policy; a National Audit Office that shows self-restraint in development of its own public role, uses careful language, and defers to the Public Accounts Committee; and a quality press that follows Parliament closely, combined with large numbers of scholars who are acutely interested in institutions and who publish books and articles on institutions. In Canada, none of these conditions is met. The last great scholars of Canadian political institutions are gone or retired, and too few younger scholars aspire to replace them. The danger that everything surrounding the Accounting Officer provision would be scandalized seems acute.

However, it may be possible to realize the goals of such a reform if the goal were prevention as opposed to punishment. For example, the parties to a dispute over the probity of an expenditure the Minister wished to make could report their differences to the President of the Treasury Board and the Prime Minister and Clerk *before* the transaction in question was made. The Government could then review the situation and take a decision on what would be allowed. Having done so, it would then bear the responsibility collectively in the House of Commons.

8 Closing Thoughts

One must admit, in reference to all Westminster governments, that the scope of democratic control by the House of Commons is too small and operates too sporadically to control the executive. In Canada, the dominant Opposition parties and House committees are too partisan to devote real effort to protecting the public interest in good government. But the lack of power in the House of Commons cannot be remedied by neutering the executive; that would leave us with bureaucratic government. Neither can the lack of interest in the population in exercising their civic duties of voting and reacting to events be remedied by handicapping the executive. The "government by the media" would only be accelerated by attacking power in the one area in which it is consolidated. While executive-centred government has long been criticized as "executive dictatorship," it is the form of government that we have, and the one that we know — more or less — how to operate. Executive-centred government in Canada, despite large gaps in the supply of talented politicians, and almost no tradition of career politicians (ranking ministers in Government who will serve in Opposition), has supplied stable government, prosperity and some redistribution of wealth; and it has kept us out of quarrels that the majority of citizens did not want to enter. It could be worse. Therefore, changes and reforms should be undertaken with caution, and with the engagement of the Clerk and Secretary to Cabinet. This is not to say that no changes should be made. But reforms should be planned experimentally and implemented one at a time where that makes sense, such that unwanted consequences can be recognized and reversed. Once again, management policy is public policy, affects what can be done in all areas of government activity, and should therefore be attended to with the utmost seriousness.

Appendix A:

Periods in Office for Secretaries to Cabinet in Canada, UK and Australia

Name	Period in Office	Tenure*
Canada		
Gordon Robertson	1963–1975	12 years
Michael Pitfield	1975–1979, 1980–1982	8 years
Marcel Massé	1979–1980	1 year
Gordon Osbaldeston	1982–1985	3 years
Paul Tellier	1985–1992	7 years
Glen Shortliffe	1992–1994	2 years
Jocelyne Bourgon	1994–1999	5 years
Mel Cappe	1999–2002	3 years
Alex Himelfarb	2002–	
United Kingdom		
Burke Trend	1963–1973	10 years
John Hunt	1973–1979	6 years
Robert Armstrong	1979–1988	9 years
Robin Butler	1988–1998	10 years
Richard Wilson	1998–2002	4 years
Andrew Turnbull	2002–2005	3 years
Gus O'Connell	2005	
Australia		
John Bunting	1959–1968, 1971–1975	14 years
Lennox Hewitt	1968–1971	3 years
John Menadue	1975–1976	1 year
Alan Carmody	1976–1978 (died in office)	2 years
Geoffrey Yeend	1978–1986	8 years
Michael Codd	1986–1991	5 years
Michael Keating	1991–1996	5 years
Max Moore-Wilson	1996–2002	6 years
Peter Shergold	2002	

* The tenure of each official fits between the years cited and has been rounded to the nearest year.

Appendix B:

The U.K. Committee on Standards in Public Life*

The Committee on Standards in Public Life has made a difference—on the whole for the good. Created in response to a political crisis over 'sleaze' in autumn 1994, it has survived to cope with the era of 'spin', and, now, worries over cronyism. The Committee was, and is, necessary because the normal political processes have not devised generally acceptable ways of dealing with ethical problems in the public sector. A decade ago, the House of Commons had failed lamentably to respond rapidly and effectively enough to charges about MPs' financial conflicts of interest. The same was true over public appointments and the financing of political parties. So finding a solution had to be farmed out to an independent committee of the good and the great. Like all committees, there have been passengers, often rather too many. Eminence in one part of public service has been no guarantee of insight or shrewdness about broader questions of standards. The Committee should have a few more daring and unconventional members.

A more serious fault was the failure in the first few years to commission any research into either public views or the extent of ethical problems. It was a very British process of relying upon the opinions of witnesses, rather than facts. That omission has been partly remedied in recent years by the research into public attitudes and other surveys. Nonetheless, the Committee has had a positive impact. The revamped system of Commons self regulation and disclosure is now operating pretty well, despite a blip in 2000-01 and subsequent adjustments (recommended by the Committee). Similarly, the establishment of the Electoral Commission to oversee the conduct of elections and the finances of parties, has been an undoubted plus. A more qualified verdict can be given about the procedures for public appointments (the Nolan rules).

The most successful of the Committee's proposals have been increased transparency and disclosure: on MPs' financial interests, the funding of parties etc. The least effective and most controversial have been the new regulatory mechanisms. The two are linked since, obviously, disclosure has to be policed. But there are legitimate complaints from parties and local councillors about disproportionate regulatory burdens, particularly when dealing with voluntary and part-time office holders, like local party treasurers or parish councillors. Some of that is not the Committee's fault since its proposals have been 'gold-plated' in both subsequent legislation and implementation. Some of the questions of balance were addressed in the Tenth Report in January 2005.

The Committee's biggest impact has been outside central Government: on Parliament, local councils and the political parties. Whitehall, and particularly the centre (10 Downing Street and the Cabinet Office) have resisted suggested new rules or safeguards which the Prime Minister and Cabinet Secretary fear might cramp their freedom of manoeuvre. In general, the Committee has been right and the Government wrong. Tony Blair would have saved himself lots of grief if he had adopted the Committee's recommendations for an independent ethical adviser to ministers and for a permanent panel of investigators, as well as a *Civil Service Act*. And, now, there is conflict over the procedures for public appointments.

One consequence has been an evolution in the Committee from being a solver of the establishment's problems—during the chairmanships of Lords Nolan and Neill—to becoming more of a thorn in the side of Whitehall. The Committee has become the ethical conscience which Whitehall would rather not have, joined often by other independent monitors like the Civil Service Commissioners and the Public Appointments Commissioner (in itself created following a recommendation of the Committee). At times, it seems that the Cabinet Office would rather that the Committee just faded away. But problems of trust and standards in public life have not gone away. The Committee is still needed.

---

* "The First Ten Years," by Peter Riddell, Chief Political Commentator, the *Times* (UK). *Annual Report on the Committee on Standards in Public Life 2004*, p. 6.

Endnotes

* Visiting Professor, Public Administration Program, School of Political Studies, University of Ottawa. I would like to give special thanks for their help to my colleagues David Elder from Queen's University, and K.P. Joseph of Trivandrum, Kerala, India; and also to C.E.S. Franks of Queen's University, and Donald Savoie of the University of Moncton and Director of Research for the Commission. Lindsay Aagaard of McGill provided such efficient and intelligent research assistance that I am convinced she will go far. More than a dozen friendly colleagues gave me their time to talk about the heart of this assignment. They know who they are. Writing was completed in October 2005.

[1] Richard D. French, "Privy Council Office: Support for Decision Making," in *The Canadian Political Process* (3rd ed.), ed. R. Schultz et al. (Toronto: Holt, Rinehart and Winston, 1979), pp. 363-94. Canadians must also be able to decode our successive governments' tendencies to seize upon vestigial titles and bring them to back to life in different forms and sometimes startling vitality. For example, the title, President of the Privy Council, a non-governing body in its entire membership, has recently been used for the Minister who is Leader of the Government in the House of Commons, a lively job, and for the Minister of Intergovernmental Affairs. Earlier, this ministerial office, called by J.R. Mallory a "near sinecure," had since 1896 been almost always held by the Prime Minister. See J.R. Mallory, "Cabinets and Councils in Canada," *Public Law* (1957): 231-51.

[2] Peter Hennessy, "The Importance of Being Collective: Cabinet Government since 1945," a talk delivered at Queen's University on June 21, 1995, p. 3. See also Rodney Brazier, *Ministers of the Crown* (Oxford: Clarendon Press, 1997), p. 6. Brazier's reading of the *Gazette* has the Prime Minister entering after the Archbishop of York, but what matters is that this is the first formal recognition of the Prime Minister's position as premier. Brazier's first chapter on the composition of government explains the old titles that grew out of the Royal Household, many of which now serve as sinecures in the gift of the Prime Minister to allow important politicians to pursue particular projects as ministers.

[3] See John P. Mackintosh, *The British Cabinet* (London: Stevens and Sons, 1977).

[4] Gregory Tardi, *The Legal Framework of Government* (Aurora, Ontario: Canada Law Books, 1992), p. 83.

[5] Peter Aykroyd, "To Swell a Progress" (Ottawa: Privy Council Office, March 1974), p. 13. David Elder brought this useful and original work to my attention.

[6] I very much regret that, owing to time constraints, I was able to interview only three persons who had served as Clerk. However, as the views communicated by these interviewees, 10 others (most of whom had served in PCO and TBS senior positions) and a senior journalist were generally convergent in content, I believe that the insider material, on balance, complements the literature review and provides a solid interpretation of the evolution of the Clerk's role and what is possible for a Clerk to accomplish.

[7] Lindsay Aagaard conducted a search on the print media coverage of the Clerk (Canada) and Secretary to Cabinet in the UK using the *Globe and Mail* and *Times of London* back to 1985. She also compiled changes in roles and legislation. Work on the media review in Australia was suspended owing to time pressures and lack of user-friendly search tools.

[8] W.E.D. Halliday, "The Privy Council Office and Cabinet Secretariat in Relation to the Development of Cabinet Government," *Canada Year Book* (Ottawa, 1956), p. 62.

[9] W.E.D. Halliday, "The Executive of the Government of Canada," *Canadian Public Administration* (December 1959): 229.

[10] Ibid.

[11] Peter Hogg, *Constitutional Law of Canada* (3rd ed.) (Toronto: Carswell, 1992), p. 15.

[12] Ibid., p. 17.

[13] Privy councillors from previous governments remain members of the Privy Council for Canada. Other persons may be appointed as councillors as an honour. For this reason, only the privy councillors who have been appointed to positions in the current Government compose the Privy Council active in a current formal executive. See Margaret A. Banks, "Privy Council, Cabinet, and Ministry in Britain and Canada: A Story of Confusion,"*Canadian Journal of Economics and Political Science*, 31 (May 1965): 193-205.

[14] See J.L. Granatstein, *The Ottawa Men: The Civil Service Mandarins, 1935-1957* (Toronto: Oxford University Press, 1982), pp. 196-97, 202-203, for interesting details on how Heeney won his argument with Prime Minister King, despite opposition from Cabinet, to combine the Clerk job with the new non-partisan job of Secretary to Cabinet.

[15] The Governor-in-Council appointment of the Clerk is provided for in the *Public Service Employment Act*, s. 40 (a). Tardi, *Legal Framework of Government*, p. 139, 14.3.

[16] Peter Aykroyd, p. 5.

[17] A.D.P. Heeney, "Cabinet Government in Canada: Some Recent Developments in the Machinery of the Central Executive," *Canadian Journal of Economics and Political Science* 12 (August 1946): 282.

[18] Ibid., Appendix A, "Functions of the Prime Minister," Order-in-Council P.C., 1853, May 1, 1896: 298-99.

[19] Privy Council Office, "The Responsibilities of the Privy Council Office," p. 4, http://www.pco-bcp.gc.ca and search for the document title.

[20] Tardi, *Legal Framework of Government*, p. 87, 8.3.2.

[21] Crossman set out his argument in the introduction to the following edition of Bagehot: Walter Bagehot, *The English Constitution* (London: Fontana, 1963).

[22] For more detail, see Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999). Savoie analyzes the previous 30 years. For an interesting if idiosyncratic long comment on Savoie, see Lorne Sossin, "Speaking Truth to Power? The Search for Bureaucratic Independence in Canada," *University of Toronto Law Journal*, 55 (winter 2005): 55-59.

[23] Mallory, "Cabinets and Councils," p. 236.

[24] See, for example, Herman Bakvis, *Regional Ministers: Power and Influence in the Canadian Cabinet* (Toronto: University of Toronto Press, 1991).

[25] Mallory, "Cabinets and Councils," p. 236.

[26] All information in this section is taken from Government of Canada, Privy Council Office, *Report on Plans and Priorities 2005-2006*, web page version.

[27] It is unclear at time of writing whether the junior ministerial job, Minister of Official Languages, will move to Treasury Board's portfolio, following the management responsibility for the function.

[28] Gordon Osbaldeston, *Keeping Deputy Ministers Accountable* (Toronto: McGraw-Hill Ryerson, 1989), p. 55.

[29] "Responsibilities of the Privy Council Office."

[30] Simon James, "British Cabinet Government" (London and New York: Routledge, 1992).

[31] "Responsibilities of the Privy Council Office."

[32] Ibid.

[33] The PCO has responsibility for: maintaining a performance-management and succession-planning system developed in the mid-1990s; assisting PMO with any recruitment activities for Order-in-Council vacancies; management of a classification and compensation system and awards. See the PCO website, http://www.pco.gc.ca.

[34] Information based on two interviews conducted with former PCO senior officers: June 11 and July 31, 2005.

[35] Interview, September 19, 2005.

[36] In Australia the equivalent top-layer appointees serve for a specific term of up to five years.

[37] Halliday, "The Executive," p. 234.

[38] Tom Blackwell, *Ottawa Citizen*, September 15, 2005: A5. Minority governments occur more frequently than Ms. Clarkson believes, and may continue for some time from the current minority as they reflect the public standing of political parties. According to the Library of Parliament's web document, "Duration of Minority Governments 1867 to Date," minority governments were elected in the following years: 1921, 1925, 1957, 1962, 1963, 1965, 1972, 1979 and 2004, many lasting for a couple of years while others for only months.

[39] www.gg.ca

[40] Brazier, *Ministers of the Crown*, p. 146. The historical material is drawn from the web version of *Britannica*, sections of which are posted on the UK's site (http://www.cabinetoffice.gov.uk).

[41] See the site for The United Kingdom Parliament: www.parliament.uk

[42] The title First Lord of the Treasury dates from medieval times, when the Government was consolidating its control and administration of finance. It sometimes became convenient to appoint a group of commissioners to carry out the duties of the Lord High Treasurer. In the commission, which operated into the 18th century, the first-named commissioner held the title First Lord of the Treasury, and other members were Lords Commissioners. When this board wound up, evolving into government whips, the biggest role in financial affairs was taken over by the incumbent of an office called the Chancellor of the Exchequer, who fills that role today. The prestige and gifts controlled by the First Lord made him the *de facto* manager of the emerging Cabinet when, by coincidence, just after the death of Louis XIV in 1715, the title *Premier Ministre* was recognized in France by royal decree. This was seized on and used in Britain as an insult, because a notable faction of politicians and constitutional thinkers resisted the idea of a "first" or "sole" minister. Its eventual acceptance did, however, clarify the political situation. At present, the superfluous title, First Lord, is cemented in place by the *Ministers of the Crown Act* of 1937. This Act provides a salary for "the Prime Minister and First Lord of the Treasury." See Brazier, *Ministers of the Crown*, pp. 5-6.

[43] At time of writing, two versions were under consideration.

[44] "Prime Minister's Speech on Reforming the Civil Service," 24.02.04, Downing Street press release, as cited in Peter Hennessy, "Rulers and Servants of the State: The Blair Style of Government 1997-2004," *Parliamentary Affairs* 58,1 (2005): 8. Hennessy's basic message is that, under Blair, Cabinet is either supine or not present for major decisions, many of which take shape in day-long rolling meetings of variable composition, which move between Downing Street and the private quarters. Hennessy cites the Hutton Inquiry to devastating effect. Jonathan Powell, the Prime Minister's Chief of Staff, reported to Lord Hutton that, on consulting his diary, he had established that the "usual pattern is about three written records" for about 17 meetings a day. See Hennessy, p. 12, citing the Hutton Inquiry Transcript at 18.8.03.

[45] There is at present "no formal description" of the "two distinct roles" of the Cabinet Secretary and Head of the Home Civil Service (personal communication to the author from Mr. Mark Talbot, Cabinet Secretary's Office, May 24, 2005). There is likewise no evidence that the Head produces an annual report on his or her activities. Except where otherwise noted, all material on the operations of the Cabinet Secretariat is from the dedicated site www.cabinetoffice.gov.uk.com. The Wikipedia site (www.wikipedia.com?cabinet secretary) provides a description of the Cabinet Secretary role.

[46] Brazier, *Constitutional Practice* (Oxford: Oxford University Press, 1999), p. 102.

[47] See http://www.number-10.gov.uk and also the Cabinet Office through the Government portal.

[48] C.E.S. Franks, "The Head of the Public/Civil Service in Britain and Canada: Relations between Politicians

and the Bureaucracy"; a paper prepared for the SOG Conference on the theme of "State, Civil Society and Administration: Their Interface," co-sponsored by Bangalore University and the Research Committee on Structure and Organization of Government, International Political Science Association (Bangalore, March 2000, p. 3), citing House of Lords Debates of 25 November 1942 et seq., as reproduced in G.H. L. Le May, *British Government, 1914-1963: Selected Documents* (London: Methuen, 1966), pp. 273-79.

[49] Franks, "Head of the Public/Civil Service," p. 6.

[50] Kevin Theakston, "William Armstrong," chapter 8 in *Leadership in Whitehall* (New York: St. Martin's Press, 1999), pp. 183-84.

[51] Ibid., p. 13.

[52] James, *British Cabinet Government*, p. 201.

[53] Theakston, "William Armstrong," p. 15.

[54] Mark Bevir and R.A.W. Rhodes, *In reting British Governance* (New York: Routledge, 2003), p. 84.

[55] Ibid., pp. 130-32.

[56] Brazier, *Constitutional Practice*, pp. 180-81, 184.

[57] See House of Commons Information Office, "Statutory Instruments: Fact Sheet L7, Legislative Series," revised June, 2005, p. 10.

[58] Orders granted at Privy Council are available on the Privy Council Office site, without the discussion.

[59] Baroness Amos, born in Guyana in 1954, is the first Black woman to sit in the British Cabinet, and the second Black person to do so. She is one of three Black peers in the House of Lords. She was appointed a life peer by the Labour Government in 1997, serving first as Government Whip in the Lords and as a member of a European Union Subcommittee on social affairs. When Clare Short resigned in early 2003 to protest the Prime Minister's approach to the Iraq war, Baroness Amos was appointed Secretary of State for International Development and took a seat in Cabinet. Less than six months later, the then Leader of the House of Lords died suddenly, and Baroness Amos was appointed to this post. Her background is in local government and social services and social justice.

[60] See chapter 4, "Fragmented Government," in Peter Aucoin, *The New Public Management: Canada in Comparative Perspective* (Montreal, IRPP, 1995). See http://newsvote.bbc.co.uk and search on "Baroness Amos."

[61] Government of Canada, *Public Service 2000: The Renewal of the Public Service of Canada* (December 1990), p. 4.

[62] Ibid., p. 34. This reduction came from costs for accommodation, supplies and travel ($6.4 billion), for administration of the personnel function ($2 billion), and from the public service payroll ($10 billion).

[63] Government of Canada, *Public Service 2000: Second Annual Report to the Prime Minister on the Public Service of Canada* (March 25, 1994), p. 3. See also John Fryer, *First Report: Advisory Committee on Labour Management Relations*, 2000, paragraph 1.3, "The Public Service at a Crossroads."

[64] PS 2000 recommended reducing the 72 occupational groups and 106 subgroups to 23 and 8, respectively, as well as negotiating consolidation of the 78 bargaining units and more than 840 pay rates and 70,000 rules for pay and allowances. Canada, *Annual Report of the Auditor General 1996, The Reform of the Classification and Job Evaluation in the Public Service*, chapter 5, paragraph 5.7.

[65] *Public Service 2000: Second Annual Report*, pp. 8-9.

[66] Ibid., p. 2.

[67] It could be argued that there is a need for a corporate level communication to address a phenomenon that Franks identified in 1987. The largest number of public servants, he says, see Parliament as a distant and unimportant control, C.E.S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987), pp. 233-34.

[68] On the other hand, at least two of our Treasury Board secretaries, both respected intellectuals, have written on the Secretariat and many other topics. I have in mind Al Johnson and Ian Clark.

[69] Gordon Robertson, "The Changing Role of the Privy Council Office," *Canadian Public Administration*, 14 (winter 1971): 487-508.

[70] Paul Tellier, "L'évolution du rôle du Bureau du Conseil privé et du secrétaire du Cabinet," *Administration publique du Canada* 15 (été 1972) : 377-82.

[71] Michael Pitfield, "The Shape of Government in the 1980s: Techniques and Instruments for Policy Formulation at the Federal Level," *Canadian Public Administration*, 19 (spring 1976): 8-20.

[72] Robertson, "The Changing Role": 500.

[73] Ibid., 506.

[74] Ibid., 507.

[75] Pitfield, "The Shape of Government": 11. The NPM goal to improve the capacity of politicians to control the shape and direction of policy and its implementation is laudable. In fact, one can judge the various institutional forms developed to give the population some control over policy against this criterion.

[76] Ibid., pp. 13-14. Denis Smith is a critic of the belief that social indicators and systems theory could replace the judgmental elements embedded in management in government as expressed by Thomas D'Aquino in his article, "The Prime Minister's Office: Catalyst or Cabal?" *Canadian Public Administration* 17 (spring 1974): 555-79. Smith cites D'Aquino's claim that in the Trudeau PMO from 1968 to1972, "scientifically based political analysis came to supplement raw political intuition." Smith responds that "the outward evidence is that the process failed badly from 1968 to 1972, and he provides a list of examples. Smith's conclusion on D'Aquino's faith in systems theory is worth repeating: "[T]he paper has a certain tone of technocratic and managerial utopianism, vintage Trudeau '68-'72, which implies that politics is above all a matter of technique. Mr. D'Aquino perhaps aims at a system in stable equilibrium without great disruptive tensions. But a democratic political system cannot be a 'system' in that sense." Denis Smith, "Comments on 'The Prime Minister's Office: Catalyst or Cabal?' *Canadian Public Administration* 17 (spring 1974): 82-84.

[77] Charlotte Gray, "The Fixer," *Saturday Night* (December 1985): 13-14, 16-17.

[78] Christina McCall-Newman, "Michael Pitfield and the Politics of Mismanagement," *Saturday Night* (October 1982): 24-44.

[79] Michel Vastel, "Miss Canada fait le grand ménage," *L'Actualité* (1er novembre 1994): 28-35.

[80] S.L. Sutherland, "Bossing Democracy: The Value-for-Money Audit and the Electorate's Loss of Political Power to the Auditor General," in *Rationality in Public Policy: Retrospect and Prospect, A Tribute to Douglas G. Hartle* (Canadian Tax Paper no. 104), ed. Richard M. Bird, Michael J. Trebilcock and Thomas A. Wilson (Toronto: Canadian Tax Foundation, 1999). Canadians are not alone in having implemented systems based on the idea that it is possible to measure results, or in loosening control without a technique to keep track of what is happening, but we have been slower than others in working to strengthen controls other than by attempts to assess results or (strategic) outcomes. J.R. Nethercote reports as early as 1989 on the "apologia" of the Finance Department secretary Michael Keating, who admitted in a debate that "measures of performance can in most cases only be an aid to judgment" and that managerialist changes there had "run ahead of progress in implementing external accountability requirements." See Nethercote's "The Rhetorical Tactics of Managerialism," *Australian Journal of Public Administration* 48 (December 1989): 364. The British have placed emphasis on targets — amelioration of defined problems — instead of results measurement or, its successor in federal Canada, "strategic outcomes." Targets are obviously much more immediate and measurable in comparison to strategic outcomes, now in fact largely handled in reports by extremely long narratives and descriptions. The resort to narrative clarifies the scope of the mistake made by the OAG and TBS in persisting under their "results" and "outcomes" policies.

[81] McCall-Newman, "Michael Pitfield": 31.

[82] Ibid., 34. Most of these ideas were coming forward from business applications where "policy" had a completely different meaning. Certainly they are the forerunners of the New Public Management.

[83] Gray, "The Fixer": 14.

[84] Ibid.

[85] Ibid., 13.

[86] Ibid., 13–17.

[87] Government of Canada, *Public Service 2000: Renewal*, preface.

[88] Vastel, "Miss Canada": 28–30.

[89] Ibid., 35.

[90] Ibid.

[91] Sir Richard Wilson, "Portrait of a Profession Revisited," *Public Administration* 81, 2 (2003): 367.

[92] See Savoie, *Governing from the Centre*, pp. 121, 132–33, where he explains the "fixer" role as one of managing issues the Prime Minister finds sensitive, and managing both visible errors and invisible problems.

[93] Richard Mulgan, "On Ministerial Resignations (and the Lack Thereof)," *Australian Journal of Public Administration* 61, 1 (2002): 124. Mulgan explores the "many hands" problem in attributing blame.

[94] The Gomery Inquiry did not examine OAG personnel, including the audit team for PWGSC, about why they had overlooked the management of the sponsorship unit despite whistle-blowing in 1996 and troubling internal audit reports after that.

[95] David Taras, "The Mass Media and Political Crisis: Reporting Canada's Constitutional Struggles," *Canadian Journal of Communications*," 18, 2 (1993): 23. I used the online version (http://info.wlu.ca/~wwwpress/jrls/cjc/BackIssues/18.2/taras.html), so page references are approximate.

[96] Ibid., 3.

[97] It is worth remembering that "empowerment" rhetoric, which boils down to putting ends before means, was explicitly endorsed by the Auditor General of the day. See Ian D. Clark, "Distant Reflections on Public Service Reform in the 1990s," in *Public Service Reform: Progress, Setbacks and Challenges* (Ottawa: Office of the Auditor General, February 2001).

[98] See S.L. Sutherland, "Biggest Scandal in Canadian History: HRDC Audit Starts Probity War," *Critical Perspectives in Accounting*, 14 (2003): 187–224.

[99] The AG completed the audit of the three Groupaction contracts, referred her results to the RCMP, began her study of sponsorship and a government-wide audit of advertising, and completed the last task in November 2003.

[100] Mark Bevir and R.A.W. Rhodes, *Interpreting British Governance* (London: Routledge, 2003), p. 30.

[101] Ibid., p. 82, citing Christopher Hood, "A Public Management for All Seasons?" *Public Administration*, 69: 3–19.

[102] It was also felt that the Clerk could have given more public support for modern comptrollership and the new expenditure management system. In fact, there are single references in two annual reports (5th and 11th).

[103] For example, the first of PCO's desired strategic outcomes is as follows: "The policy and program agenda of the Government of Canada are well coordinated and the Government is well structured to respond efficiently to the needs of Canadians" (*Privy Council Office, Report on Plans and Priorities, 2005–2006*). It would be impossible to apply evidence to disprove such a strategic outcome, short of some series of management catastrophes perhaps a hundred times more serious than the sponsorship events. On the other hand, the second goal dignified as a strategic outcome is that "[s]ubjects that need investigation or further study are handled independently from the Government." Achieving this outcome involves only administrative decisions and resources.

See, for example, Christopher Hood et al., "Regulation in Government: Has It Increased, Is It Increasing, Should It Be Diminished?" *Public Administration*, 78, 2 (2000): 283–304.

David Cooper and Ken Ogata, "New Public Management Reforms in Canada: Success and Failure?" *Critical Perspectives on Accounting*, 14 (2003): 1. Cooper and Ogata are citing Christopher Pollit and G. Bouckaert, *Public Management Reform: A Comparative Analysis*. (Oxford: Oxford University Press, 2000), p. 214.

Cooper and Ogata, "New Public Management": 32–35.

For example, Paul du Gay (ed.), *The Values of Bureaucracy* (Oxford: Oxford University Press, 2005). See also Matthew Flinders, *The Politics of Accountability in the Modern State* (Aldershot: Ashgate, 2001).

Gordon Osbaldeston, *Keeping Deputy Ministers Accountable* (London, Ontario: National Centre for Management Research and Development, School of Business Administration, University of Western Ontario, 1988). Figure 4–2 on page 83 of this study puts the Minister and the Deputy Ministe at the centre of a diagram in which no fewer than 20 classes of actors have their word to say, limiting the Minister and Deputy in their policy agenda.

Mulgan, "On Ministerial Resignations (and the Lack Thereof)": 124.

Ibid., 125, 126.

Charles Polidano, "Why Bureaucrats Can't Always Do What Ministers Want: Multiple Accountabilities in Westminster Democracies," *Public Policy and Administration* 13 (spring 1998): 35–50.

Gyorgy Gajduschek, "Bureaucracy: Is It Efficient? Is It Not? Is That the Question? Uncertainty Reduction, an Ignored Element of Bureaucratic Rationality," *Administration and Society* 34, 6 (January 2003): 700–701.

See, for example, the discussion on the civil service provided by Directgov at http://www.directgov.uk (Guide to Government/Central Government and the Civil Service/Government Departments)

The Prime Minister targeted the Lord Chancellor ostensibly because he is, and in Brazier's words, "a denial of the doctrine of separation of powers." The Lord Chancellor was and is a Minister. Before the changes he was Speaker of the House of Lords and head of the judiciary, and he sat as a judge in the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. See Brazier, *Ministers of the Crown*, p. 4. The result of amendments in the House of Lords boiled down to saving the title, which will be used alongside Minister for Constitutional Affairs, and divesting all of the functions except for ministerial duties connected with the new organization.

Patrick Wintour and Clare Dyer, "Reshuffle Ends Job of Lord Chancellor: Blair Takes on Mantle of Radical Reformer as He Abolished 1,400-year-old Constitutional Role at a Stroke," *Guardian Weekly* (June 19–25, 2003): 8.

Robertson, "The Changing Role," 501.

David Hill of Cabinet Office's Propriety and Ethics Team, communication of September 22, 2003, in reply to my inquiry of September 3. Mr. Hill attached a scanned copy of the 1997 order, and explained that under the order, "the legal definition of a special adviser is a post where the holder is appointed by a Minister 'for the purpose only of providing advice to any Minister, and for a period which cannot extend beyond the end of an Administration.' The effect of the 1997 order is to remove the restriction confining the three posts in No. 10 to the 'provision of advice,' which thus enables them to exercise executive powers."

Great Britain, *Ninth Report of the Committee on Standards in Public Life* (chair: Sir Nigel Wicks), "Defining the Boundaries within the Executive: Ministers, Special Advisers and the Permanent Civil Service" (April 2000, Cm 5775, Wicks, chapter 7, "Special Advisers," webversion).

Committee on Standards in Public Life, "Changes to the Law on Special Advisers"(PN170, 19 July 2005), and "Revision of the Code of Conduct for Special Advisers" (PN171, 21 July 2005).

[illegible] *Ninth Report on Standards in Public Life*, chapter 6, "The Permanent Civil Service," subsection entitled, "Working Relationships: The Principal Private Secretary." The recommendation that principal private secretaries should continue to be permanent civil servants is preceded by the statement: "It is especially important that it is a politically impartial civil servant who has the responsibility for ensuring that the Minister has the full range of governmental advice affecting his or her duties."

[illegible] Earlier this year, a British pharmaceuticals industrialist donated £50,000 to the Labour Party, was subsequently made a Lord in the Prime Minister's Honours List, and then made a second donation of the same amount. His firm was then awarded a huge untendered contract. See Michael White, "On May 1 Paul Drayson Was Given a Peerage. On June 17 He Gave Labour a £50,000 Cheque," *Guardian*, August 25, 2004, http://politics.guardian.co.uk (search "archives" on "Paul Drayson"). The *Guardian Weekly* reported in its issue of August 26 to September 1, 2005, that recently released documents reveal that the British Ministry of Defence had awarded the biggest nuclear construction project in Europe to the company DML, part owned by Halliburton, in the face of warnings and objections by MOD officials. Officials concluded in their assessment that DML failed eight of 10 criteria of competence for the project. The contract was awarded in the 1990s, costs have now doubled to almost a thousand million pounds, and the contract will run at least another five years. *The Guardian Weekly*, "Halliburton Just Keeps Raking It In": 12.

[illegible] The sponsorship frauds are not even particularly large; they are important because of the potential political connections. See Hugh Winsor, "When the Crime Has No Punishment," *Globe and Mail*, May 30, 2005: A4. Winsor notes, among other frauds in which senior management has taken little interest in unravelling the mechanisms and publicizing them as lessons, that of a $58,000 a year employee of the Department of National Defence who took more than $100 million from a single computer services contract.

[illegible] Franks, "Head of the Public/Civil Service," p. 21. Parenthetically, it is interesting that a minority government whose very existence has been hotly contested in the House of Commons since the release of the AG's commissioned audit report on Sponsorship in March 2002 can muster the power and confidence for these major reforms. The fact may well speak to the lack of interest of the Opposition parties in management policy as public policy.

[illegible] Ibid., p. 19.

[illegible] Sharon Sutherland, "Braybrooke on Decision Making for Public Policy: Precautionary, Fair, Feasible and Ameliorative," in *Engaged Philosophy: Essays in Honour of David Braybrooke*, ed. Susan Sherwin and Peter Schotch (Toronto: University of Toronto Press, 2005), chapter 6.

[illegible] For more on the Committee, see http://www.public-standards.gov.uk/default.htm

[illegible] For example, see *Corruption, Character and Conduct: Essays on Canadian Government Ethics*, ed. John W. Langford and Allan Tupper (Toronto: Oxford University Press, 1993).

RESPONSIBILITY, ACCOUNTABILITY AND THE ROLE OF DEPUTY MINISTERS IN THE GOVERNMENT OF CANADA

James Ross Hurley*

1 Purpose and Scope

This study will examine the issues of responsibility and accountability in Canada's system of responsible parliamentary government, with a particular emphasis on the role Deputy Ministers play in the Government of Canada. In pursuing this matter, the British institution of Accounting Officer (an ancillary function assigned by Treasury regulation and, since 2002, by law to the persons fulfilling the role of Deputy Minister in the Government of the United Kingdom) will be reviewed and the advisability, or not, of adopting it in Canada will be assessed.

The study will begin with a review of the fundamental principles underlying responsible parliamentary government in Canada. Although these principles have remained constant for over 150 years, the nature of government in Canada has evolved and a number of those changes — and their implications for responsible government — will be noted. While recognizing that there is a lack of consensus on the precise meaning to give to certain key words in any given context, definitions — for the purposes of this study — will be provided for the terms "responsibility," "accountability" and "answerability."

A distinction will be made between political actors (Ministers and their political exempt staff) and professional actors (Deputy Ministers and members of the public service): they are subject to different rules and constraints and to different sanctions for poor or improper behaviour. The role of Deputy Ministers in the Government of Canada will then be set out, including the multiple responsibilities and accountabilities. The mechanisms in Canada for political and professional financial accountability will be reviewed, including the issue of sanctions for poor or improper behaviour.

The British institution of Accounting Officer will be examined and an assessment made as to whether it would be appropriate to adopt it in Canada.

The study will conclude with a number of recommendations.

2 The Fundamental Principles Underlying Responsible Parliamentary Government in Canada

The preamble to Canada's *Constitution Act, 1867* states that the federating provinces had expressed their desire to have "a Constitution similar in principle to that of the United Kingdom." On this basis, the constitutional conventions of Britain's unwritten Constitution were transferred to Canada, although a few of the conventions were partially clarified in the text of the 1867 Act (for example, sections 53-57, dealing with money votes and royal assent).

Britain's system of responsible parliamentary government involves the melding or fusion of the executive and the legislative branches of the state in a single institution — Parliament (or, as some would say, the Crown in Parliament). The British Parliament consists of three elements: the Crown, the House of Lords and the House of Commons. In Canada, Parliament consists of the Crown, represented by the Governor General; the Senate; and the House of Commons.

The fundamental principles underlying responsible parliamentary government in Canada are as follows:

- the executive powers of the state are vested in the Queen (represented by the Governor General);
- the Governor General almost invariably acts on the advice of the Prime Minister and the other Ministers who form the Cabinet;
- the Governor General appoints as Prime Minister the leader of the party that enjoys the confidence of the House of Commons (although an incumbent Prime Minister who is defeated in an election has the right to meet the new House and test whether he or she has its confidence);
- the Prime Minister chooses the persons who will be Ministers in the Cabinet;
- the Prime Minister and the other members of Cabinet must have seats in Parliament (or get them within a reasonable time frame);
- most members of Cabinet must be Members of the House of Commons (but at least one Senator must be named to Cabinet to represent the Government in that House);
- the House of Commons is the confidence chamber: if the Prime Minister or the Government loses the confidence of the House of Commons, the Prime Minister must resign or recommend to the Governor General that Parliament be dissolved and a general election held;

- the resignation of the Prime Minister results in the resignation of Cabinet;
- the House of Commons holds the power of the purse: no taxation can be imposed without the consent of the Commons, and the Commons must consent to all expenditures of money;
- only members of Cabinet may introduce in the House of Commons a bill to raise revenue (such bills cannot be initiated in the Senate);
- only members of Cabinet may introduce in the House of Commons a bill to spend money (such bills cannot be initiated in the Senate);
- only members of Cabinet may introduce in the Commons amendments to increase the expenditure of money (such amendments cannot be initiated in the Senate);
- all members of Cabinet are collectively responsible for the Cabinet decision-making process and accountable to the House of Commons for the policies of the Government (Ministers must resign or be dismissed if they disagree with the Government's policies);
- Ministers are individually accountable to the Commons for their personal conduct;
- Ministers with portfolios are individually accountable to the Commons for the management of their departments;
- the Cabinet is supported by the public service in the management and administration of the Government of Canada;
- public servants are, through a hierarchical organization, accountable to Deputy Ministers, who, in turn, are accountable to Ministers;
- one function of Cabinet is to manage the public service and to be held accountable to the House of Commons; and
- one function of the Commons is to hold the Cabinet to account for the management of the public service, but not to manage the public service.

Because the House of Commons holds the power of the purse, it follows that the House must not only consent to all taxation and all expenditures but also have the means of satisfying itself that all items of expenditure and all receipts are dealt with in accordance with the legislation authorizing them. The House must be able to check that expenditures and receipts are dealt with in accordance with Parliament's intentions and the principles of parliamentary control, with due regard to economy, efficiency and effectiveness. This matter will be examined in the section of this study dealing with the mechanisms of political and professional financial accountability.

3 The Evolving Nature of Government in Canada

In 1846, Earl Grey became responsible for the Colonial Office in the United Kingdom. He sent dispatches to the able and liberal-minded governors of Nova Scotia (Sir John Harvey) and the Union of the Canadas (Lord Elgin), laying down the lines on which he felt the change to responsible self-government should be made. The first test came in Nova Scotia in January 1848, when, following an election, the Government lost a vote of confidence and J.B. Uniacke was asked to form a new government. Under similar circumstances, Baldwin and LaFontaine were asked to form a government in the Union of the Canadas in March of that year. New Brunswick, Prince Edward Island and Newfoundland followed suit shortly thereafter.[1]

Oddly enough, the Canadian practice of responsible government appears to have been based on British theory rather than British practice: D.L. Keir points out that Queen Victoria was partisan; she meddled in Cabinet-making from 1885 to 1894 (she refused to have Sir Charles Dilke as a Cabinet Minister and personally chose Roseberry as Prime Minister in 1894); she held — and expressed — strong views on public policy; and she believed that dissolution was a personal appeal to the electorate by the sovereign (as late as 1892 she had to be dissuaded from compelling a dissolution against her Ministers' advice).[2] Factors that may have encouraged British Governors or Governors General to respect the principles of responsible parliamentary government in British North America include the precedent of the revolt of the American colonies and the fact that property ownership in the British North American colonies (unlike Britain) was widespread, so most adult men could vote.[3]

The fundamental principles underlying responsible parliamentary government in Canada have remained remarkably constant since 1848, although there have been some limited qualifications. For example, it used to be thought that the defeat of the Government on a tax measure was tantamount to a vote of no confidence, but in 1968, following the defeat of a tax bill at third reading, the Government introduced a motion of confidence that was adopted and made clear that the Government did not have to resign.[4]

Notwithstanding the resilience of the fundamental principles of responsible parliamentary government in Canada, the context and the nature of government and governance have evolved significantly over the past 150 years, and it would be useful to review those changes briefly and to note their importance for the operation of responsible parliamentary government.

The development of highly disciplined political parties since Confederation has led to greater stability and predictability in Canadian politics. There were 13 Ministries during the 26 years of operation of the Union of the Canadas; there have been only 27 in the 138 years since Confederation. In 1919, the Liberal Party of Canada decided to choose its leader in a national convention, and all other parties have followed suit: this tradition means that the tenure and authority of national party leaders derives from the national convention, not from the caucus. These developments also mean that it is unlikely that a majority government could be undermined by the defection of "loose fish," as happened to Prime Minister John A. Macdonald in 1873, or that the Cabinet and caucus could unseat the Prime Minister, as happened to Prime Minister Mackenzie Bowell in 1896.

The Government and Parliament of Canada have become increasingly interventionist in the areas of social and economic policy since the Depression and the Second World War: this involvement has led to an increased legislative workload for Parliament and to a greatly expanded public service. Nowhere was the shift in priorities of government more ironically underlined than in the new Parliament Building built during the 1920s to replace the original, which was destroyed by fire in 1916: the largest and most centrally located committee room in the new structure was (and is still) called the Railway Committee Room.

Many factors have affected and altered the nature of government and governance in Canada over the last 100 years, including the following:

- The recruitment of public servants on the basis of patronage or nepotism during the first half century of Confederation gradually gave way to recruitment and promotion on the basis of merit, to securing tenure and to the creation of a non-partisan public service. In the three years following the defeat of the Laurier Government in 1911, for example, some 11,000 public servants resigned or were removed from office, largely on the basis of political partisanship.[3] During the last 40 years, other factors have been introduced into the process of recruitment and promotion, such as language requirements, the objective of equity and a "representative Public Service," and changes in legislation that confer on Deputy Ministers discretion in defining merit.

- Over the last half century, public servants have gained the right to form unions, to strike and to participate in political activity. These rights present challenges to Ministers, and the right to engage in political activity becomes especially problematic at the most senior levels of the public service, where officials must provide non-partisan support to current and future Ministers. The right of a Deputy Minister to participate in political activity is limited to the right to vote in an election.

- In the interest of managerial autonomy and freedom from partisan pressure, a number of state activities have been separated from the public service and placed under public corporations or agencies. Ministers normally are not directly responsible and accountable to Parliament for such corporations or agencies. The tabling of annual reports by such agencies and their annual appropriations do, however, provide an opportunity for parliamentary debate and scrutiny. Peter Aucoin has noted that public monies are given as endowments to independent foundations to invest and use over several years in ways that require no further ministerial approval after the initial transfer of funds, and he concludes: "Ministers have no executive authority over the foundations once they are established and funded; Parliament can hold neither Ministers nor foundations to account; and, therefore, the public has no democratic recourse."[6] The privatization of some services—such as Air Canada—has removed them from parliamentary review.

- The increased complexity of governmental activity often requires horizontal decision-making, where several departments and agencies have to collaborate and interact (in the area of national security, for example). This joint action challenges the traditional concept of Ministers being solely responsible for their own department. As Donald Savoie notes: "Because public policies and even many program decisions are now the product of many hands, we . . . need to think in terms of shared or co-accountability."[7]

- A large number of constitutional and legal constraints restrict the capacity of Ministers and officials to act, including the *Charter of Rights and Freedoms*, accumulated legal decisions, and legislation respecting official languages, access to information and privacy.

- The arrival of e-government is making vast quantities of information available to citizens, interest groups, think-tanks and research institutes, and citizens, in turn, can send messages to the Government and to MPs. Communication is no longer a one-way street.[8]

- MPs are concerned that two processes are calling traditional assumptions into question: on the one hand, the resort of the Government to consultations with financial and business interests before the preparation of the budget or to focus groups of Canadians before the preparation of legislation challenges the role of MPs as the interlocutors between the Canadian public and the Government; on the other hand, the practice of the Government to negotiate detailed agreements with the provinces and to present bills or constitutional resolutions to the House that cannot be amended, for fear of cancelling the federal-provincial agreement, puts in doubt the role of the House to dispose of its business as it sees fit and raises questions about ministerial responsibility and accountability.[9]

- Institutional changes, most notably the expansion and altered functions of the Privy Council Office since 1940 and the creation of the Prime Minister's Office, have reinforced the powers of the Prime Minister in Canada's system of parliamentary government; Members of Parliament and even Ministers, on occasion, have been critical of what is perceived to be an extraordinary centralization of power.

- The traditional "public administration" perspective on government has been challenged by the "new public management." Public administration begins with democratic and political processes and pays particular attention to institutions, decision-making processes, the relationship of senior public servants with Ministers and Parliament, and questions of responsibility and accountability, among other things. Public management seeks to understand or improve features of public organizations, such as leadership, strategic management, organizational climate, service quality, innovation, the measurement of outputs, performance and "client satisfaction," without reference necessarily to the political environment.[10] Debate over the relative merits of each approach has been vigorous.[11] The two approaches are not necessarily mutually exclusive, but as long as Canada has a system of responsible parliamentary government, the contribution of public management must occur within the overarching political perspective of public administration. As Savoie said, "I can hardly overstate the fact that public administration begins and ends with political institutions, notably Parliament and Cabinet."[12]

- The enormous impact of governmental spending on the Canadian economy has led to vigorous activity by lobby groups that seek to influence Cabinet, Parliament and public servants. This lobbying has led to a heightened awareness of the need for probity on the part of elected and non-elected officials and the development of guidelines for ethical behaviour. It also highlights the need to clarify issues related to responsibility and accountability.

This review of factors affecting and altering the nature of government and governance is broad-brush in nature and by no means exhaustive. Rather, it is intended to indicate that while the fundamental principles of responsible parliamentary government in Canada have remained essentially unchanged for over 150 years, the environment in which they operate has altered significantly. These changed circumstances pose challenges for actors in public life, both elected and non-elected.

4 Defining Terms

Contemporary languages tend to be flexible: the meaning of words can change or a word may have multiple meanings, depending on the context or the intent of the speaker. As Paul Thomas said, "Politicians, public servants, the media and even academics use terms like responsibility, accountability, answerability and responsiveness loosely and often synonymously."[13]

Peter Aucoin made a similar point: "Perhaps the most elusive dimension of the new public management is its effect on accountability. Public management reformers in each of the four Westminster systems have spoken of the need to improve accountability of Government and Ministers to the legislature; of public servants to Ministers; of public servants to their public service superiors; and, in certain respects, of public servants to legislators and even citizens directly. The several meanings attached to accountability derive from different understandings of the purposes of accountability and how they relate to one another."[14]

Publications by the Government of Canada have not always been precise in the use of these key words. In *Responsibility in the Constitution*, a document submitted to the Lambert Commission in 1977, the meaning of the term "responsible" is not clearly defined but rather implied. The document notes that "Ministers are *constitutionally responsible* for the provision and conduct of government."[15] Does this sentence mean that Ministers are empowered to conduct government or that they must give an account of how they have exercised their powers? Another sentence suggests the latter: "Parliament may focus responsibility for the conduct of government on those of its members who hold ministerial office and who in the ultimate must personally answer to Parliament and thence to the electorate for their actions and the actions of their subordinates."[16] Furthermore, the document seems to use the words "answer" and "answerable" in the way others would use the words "account" and "accountable."

In another publication, *Guidance for Deputy Ministers*, a definition is provided: "Responsibility identifies the field within which a public office holder (whether elected of unelected) can act: it is defined by the specific authority given to an office holder (by law or delegation)."[17] This sentence would suggest that responsibility refers to empowerment. The same publication also provides definitions of "accountability" and "answerability." "Accountability is the means of enforcing or explaining responsibility. It involves rendering an account of how responsibilities have been carried out and problems corrected and, depending on the circumstances, accepting personal consequences for problems the office holder caused or problems that could have been avoided or corrected if the office holder had acted appropriately." This definition suggests that accountability is the concomitant of empowerment: the obligation to explain how power was exercised and to accept the consequences for problems, including the possibility of sanctions. Answerability would appear to be a reporting function, without the possibility of sanctions in the event of problems being reported.[18]

A more recent publication is perhaps less helpful. Among other things, *Governing Responsibly* states: "In providing good government for the people of Canada, Ministers are responsible and *accountable to Parliament* for the use of those powers vested in them by statute. Ministers must be present in Parliament to respond to questions on the use of those powers, as well as to accept responsibility and account for that use."[19] This sentence suggests that "responsible" or "responsibility" refers to an obligation to accept possible blame — and sanctions — for the unacceptable exercise of power (which may, rather, be the definition of "accountability"). The publication is more helpful in dealing with the concept of "answerability": "Ministers are also required to *answer to Parliament* by providing information for Parliament on the use of powers by bodies that report to Parliament through them."[20] There is no suggestion of personal blame or sanctions against the Minister in the case of answerability.

While trying to clarify terms, John Tait's *A Strong Foundation* acknowledges the overlap in common usage between responsibility and accountability. "[Responsibility] is most often used in respect to the authority of Ministers under a system of parliamentary government and to the duties and obligations that come with this authority: ministerial responsibility. In most circumstances, accountability can be thought of as enforcing or explaining responsibility. It is often used as a synonym for 'responsibility' because both are defined by the office holder's authority; they cover the same ground. Accountability involves rendering an account to someone, such as Parliament or a superior, on how and how well one's responsibilities are being met, on actions taken to correct problems and to ensure they do not recur. It also involves accepting personal consequences, such as discipline, for problems that could have been avoided had the individual acted appropriately."[21] The Tait publication uses answerability "as a term to describe a key aspect of accountability, the duty to inform and explain. Thus answerability does not include the personal consequences that are a part of accountability. The concept of answerability sometimes is also used in circumstances where full and direct accountability is not an issue. For example, public servants are answerable before parliamentary committees, not accountable to them. Ministers are answerable to Parliament for independent tribunals, not accountable for their decisions."[22]

Clearly, opinions will vary about the precise meaning to be attached to key words or concepts. However, to avoid ambiguity, confusion or talking at cross-purposes, it will be necessary to provide—for the purpose of this study—a specific definition of each of three concepts: responsibility, accountability and answerability.

Responsibility means empowerment and identifies the field of activity over which an elected or unelected official has the authority to act (or to direct that action be taken). Collective ministerial responsibility refers to the power or authority of Cabinet over all matters falling under the jurisdiction of the Government of Canada, and such power or authority is conferred on Cabinet by the conventions of the Constitution. The most significant responsibilities of the Prime Minister are also conferred by the conventions of the Constitution. Individual ministerial responsibility is assigned to a Minister either by statute or by the Prime Minister. The responsibility of a Deputy Minister is assigned by statute (most notably by the *Interpretation Act*). The responsibility of other unelected officials in departments is assigned by instrument of delegation.

Accountability is the concomitant of responsibility and requires an office holder to inform and explain how and how well responsibilities or powers or authority *have been exercised; it also involves accepting personal consequences or sanctions for problems that could have been avoided or were not corrected in a timely fashion.* In the case of collective ministerial accountability, sanction takes the form of a vote of no confidence: if carried, the Government must resign or recommend a general election (in the three cases of a defeat of the Government on a no-confidence motion since the Second World War—in 1963, 1974 and 1979—the Prime Minister recommended a general election). In the case of individual ministerial responsibility, Ministers culpable of personal misconduct or negligence or wrongdoing in their area of responsibility will normally resign or be dismissed by the Prime Minister: the sanction is political. In the case of unelected officials, negligence, improper behaviour or wrongdoing is subject to sanctions, including dismissal, but such sanctions are applied within the Government of Canada and not by Parliament.

Answerability is the duty to inform and explain, but without personal consequences (such as discipline or sanctions). Ministers are answerable to Parliament for arm's-length corporations and agencies, but are not accountable for their decisions. Public servants are answerable to parliamentary committees, but not accountable and subject to discipline or sanctions by such committees. A function of the Government is to manage the public service, including the imposition of discipline or sanctions, and to be accountable to Parliament for such management. A function of Parliament and, in particular, of the House of Commons is to hold the Government accountable for the management of the public service, but not to manage the public service itself.

5 Political Actors Versus Professional Actors

The Prime Minister and the Ministers have two agencies to support them in the discharge of their functions. First, each has a political office staffed with partisan supporters who are exempted from the rules and regulations of the public service: they do not have to compete for positions on the basis of merit, and they do not have tenure of employment—they can be dismissed at will and lose tenure on the resignation of the Prime Minister or the Minister. Longer-term exempt staff, however, have privileged access to positions in the public service. Those supporting the Prime Minister form the Prime Minister's Office, and those supporting the Minister form the Minister's office.

Second, the Prime Minister and the Ministers have public service support to assist them in the management of the Government of Canada. The Privy Council Office, which supports the Prime Minister, and the departments, which support the Ministers, are staffed by public servants who are recruited on the basis of merit, have security of employment and are non-partisan (although a certain degree of political involvement, particularly at the lower levels of the public service, is now permitted).

Gordon Robertson, a former Clerk of the Privy Council and Secretary to Cabinet, commented on the relationship between the exempt staff serving the Prime Minister and the public servants. "One other matter that must be referred to is the relationship between the Privy Council Office and the Prime Minister's Office. It is one that calls for the greatest harmony. Given the Prime Minister's functions as leader of a political party, leader of the Government in the House of Commons, and chairman of the Cabinet, the Prime Minister's own staff are constantly securing information, analyzing and recommending on matters that relate to policies and objectives of the Government. The Prime Minister's Office is partisan, politically oriented, yet operationally sensitive. The Privy Council Office is non-partisan, operationally oriented yet politically sensitive. It has been established between the Principal Secretary of the Prime Minister and his senior staff on the one hand, and myself and my senior staff on the other, that we share the same fact base but keep out of each other's affairs. What is known in each office is provided freely and openly to the other if it is relevant or needed for its work, but each acts from a perspective and in a role quite different from the other."[11]

In the years that have passed since Robertson penned those words in 1971, much has changed. The Prime Minister's Office and the Ministers' offices have expanded, and the Privy Council Office and the various departments have also grown. There are increasing relations between political actors (Ministers and their political exempt staff) and professional actors (public servants), and there is a risk of confusing roles, functions and reporting relationships.

Arthur Kroeger, a former prominent Deputy Minister, commented on the interface between political actors and professional actors when he appeared before the Standing Committee on Public Accounts on February 21, 2005. "If you're a Deputy Minister you don't want to create a bottleneck, saying nothing is going to go near the Minister unless it comes through me and my office. What you normally do establish is to say, look, it's fine for some of the other senior officials to have direct dealings with the Minister's office, and sometimes with the Minister, but I always want my office to know what's going on. That's the important thing. You can track what's happening so that if things start to go wrong, you can take corrective action. It's not necessarily a bad thing for an Assistant Deputy Minister to deal with a Minister on a particular issue if the Assistant Deputy Minister is extremely expert, perhaps on a scientific matter, for example. You always want to keep an eye on what is happening to make sure it does stay within the bounds of what is normal and proper."[24]

Kroeger was referring to contacts between senior professional actors and Ministers or other political actors seeking information. Another—and serious—issue arises when mid-level or junior political actors in the Prime Minister's Office or a Minister's office, faced with limited resources and knowing which mid-level or junior professional actors in the Privy Council Office or the department have the requisite expertise, contact those professional actors directly and demand the production of papers on an urgent basis. This kind of communication can lead to a confusion of roles and functions, one that can disrupt the normal performance of duties by professional actors who are accountable to their public service superiors. While a certain degree of flexibility is useful, particularly in dealing with urgent situations, a blurring of the roles of political and professional actors should be avoided: political actors and professional actors are subject to different rules and constraints and to different sanctions for poor or improper behaviour.

The Deputy Minister's office acts as a bridge between the Minister and the political staff, on the one hand, and, on the other, the professional officers in the department. The Deputy Minister, normally through the executive assistant, has a role as gate-keeper or buffer between the political and the professional actors. Requests by the staff of Ministers for the production of papers should normally be channelled through the office of the Deputy Minister.

There is a reason why the Prime Minister and the Ministers are served by both political actors and professional actors: they wish to have public policy issues analyzed from two different points of view, with the attendant recommendations. If, for example, the Prime Minister has to make a foreign policy decision, his political advisors will analyze options in the light of the party platform, the views within caucus and the potential impact on chances for re-election. The professional (public service) advisors will look at options in the light of the national interest and Canada's foreign commitments. If the recommendations diverge, it is the Prime Minister who adjudicates and makes the final decision. If political and professional actors negotiated a single set of recommendations, the Prime Minister — as head of a political party and as leader of the Government of Canada — would not be well served.

6 The Multiple Responsibilities and Accountabilities of Deputy Ministers

Deputy Ministers in Canada have multiple responsibilities — powers and authorities — and those responsibilities arise from a number of statutes enacted by Parliament.

The executive government of Canada is organized into departments, which are created by Parliament through the adoption of various departmental Acts. A departmental Act assigns to the Minister the powers, duties and functions relating to the subject area as well as the management and direction of the department. The departmental Act also creates the office of Deputy Minister: by law, a Deputy Minister acts under the management and direction of the Minister. The *Interpretation Act* provides that, where a Minister is empowered or directed to carry out administrative, legislative or judicial acts, the Deputy Minister may carry out those acts, subject to certain limitations: the Deputy Minister cannot exercise the Minister's legal authority to make regulations, answer in the House of Commons on the Minister's behalf, and sign Memoranda to Cabinet on the Minister's behalf or submissions to Treasury Board involving new money or new policies.

Under the *Financial Administration Act*, Deputy Ministers are assigned specific responsibilities for the prudent management of allocated resources, including the preparation of a division of an appropriation for inclusion in the Estimates (subsection 31(1)), ensuring by an adequate system of internal control and audit that allotments are not exceeded (subsection 31(3)), establishing procedures and maintaining records respecting the control of financial commitments chargeable to each appropriation or item (subsection 32(2)), providing the required certification to authorize any payment to be made (section 34), maintaining adequate records in relation to public property for which the department is responsible, and complying with regulations of the Treasury Board governing the custody and control of public property (section 62).

Responsibilities respecting human resources management, including appointment, personnel management, employer/employee relations and the internal organization of the department, are assigned to the Deputy Minister directly, not through the Minister, by the Treasury Board, the Public Service Commission and the *Public Service Employment Act*. The Treasury Board also delegates powers to Deputy Ministers respecting the implementation of the *Official Languages Act* and the *Charter of Rights and Freedoms* relative to the provision of services to the public and the use of languages in the workplace: it is the Deputy Minister, as the departmental manager, who must find remedies to problems that have been reported. Deputy Ministers also have defined responsibilities under the *Access to Information Act* and the *Privacy Act*.

The issue of the accountability of Deputy Ministers for the exercise of their responsibilities is complex and begins with the method of appointing them. Deputy Ministers are chosen by the Prime Minister and appointed by Order in Council to hold office during pleasure. This system reflects the principle of collective ministerial responsibility and accountability: Deputy Ministers are responsible for managing their departments, but they must bear in mind the overall policies and orientations of the Government. The method of appointment indicates that, ultimately, Deputy Ministers are accountable to the Prime Minister. This accountability is reinforced by the conclusion of a performance agreement between the Clerk of the Privy Council and Secretary to the Cabinet (who is also Head of the Public Service) and the Deputy Minister.

On a day-to-day basis, a Deputy Minister's accountability is to the Minister: they work together as an inseparable team, and it is important that they build a strong personal and professional relationship. Gordon Osbaldeston noted: "Both Ministers and Deputy Ministers describe their working relationship as something akin to a marriage, where both partners work toward developing a trusting relationship with open communication. However, in this marriage it is always clear who is the leading partner. The Minister establishes the political direction for the Department, and the Deputy Minister advises, supports and assists the Minister."[25] The frequency with which Ministers and Deputy Ministers change portfolios in recent years represents a challenge in developing the necessary relationship.

The Deputy Minister is also accountable to the Treasury Board for delegated responsibilities and those assigned directly by statute (e.g., the *Financial Administration Act* and the *Official Languages Act*). In practice, the Deputy Minister's accountability to the Treasury Board is often carried out through the Secretary of the Treasury Board and through reports to and working with its Secretariat.

The Deputy Minister, finally, is accountable to the Public Service Commission for the exercise of responsibilities delegated or assigned by the *Public Service Employment Act*.

The effective management of a department in Canada's system of responsible parliamentary government requires that a Deputy Minister demonstrate considerable policy, leadership and administrative abilities and a firm commitment to ethics and values. If, in the exercise of responsibilities that are subject to the accountabilities set out above, the performance of a Deputy Minister is found to be wanting through negligence or wrongdoing, sanctions can be applied. The chief instrument for measuring the performance of these multiple responsibilities is the Performance Management Program, which is administered by the Clerk of the Privy Council: it is the Clerk of the Privy Council and Secretary to the Cabinet who would seek remedies or, if need be, advise the Prime Minister on appropriate action.

If a Deputy Minister (or, indeed, a Minister) acts illegally, recourse may be had to the judicial system.

In addition, Deputy Ministers are answerable to committees of the House of Commons. It is their duty to inform and explain. They cannot be drawn into a discussion of political options or policy advice offered to Ministers: to get involved in such issues would run the risk of undermining the political neutrality of Deputy Ministers and the relationship of trust they must nurture with Ministers. If a committee finds the testimony of a Deputy Minister to be wanting, it may make note of the fact, but it cannot impose sanctions. Poor performance before a committee will not go unnoticed within the public service, however, and it could have an impact on the Deputy Minister's performance review.

Finally, Deputy Ministers must be prepared to provide information on the administration of programs and policies to several bodies that make reports to Parliament on the activities of the Government of Canada, including the Canadian Human Rights Commission, the Auditor General, the Commissioner of Official Languages and the Information and Privacy Commissioners.

7 Mechanisms for Political and Professional Financial Accountability

The House of Commons provides the mechanism for ensuring the financial accountability of the Government: Ministers must account for the financial management of the Government to the House of Commons. If negligent, poor or improper behaviour in financial management is revealed, Ministers of departments may face sanctions, subject to the following observations:

- Ministers are answerable but not accountable for the financial management of independent, arm's-length agencies and Crown corporations (i.e., Ministers are not subject to sanctions), although they have residual responsibilities (e.g., presenting statutory amendments and making or revoking Order-in-Council appointments).

- Ministers cannot be aware of all the operations in their departments: if it is not reasonable to assume that Ministers knew about negligent, poor or improper behaviour in their individual departments, they will not be subject to sanctions, provided they take steps in a timely fashion to correct the situation once they are informed of it.
- Even though Parliament has conferred direct responsibility (and, therefore, personal accountability) on Deputy Ministers for preparing Estimates and managing public finances and property, the accountability of a Deputy Minister is to the Minister. The Minister retains the right to direct the Deputy Minister on how to act: therefore, ultimately, it is the Minister who must account to the House for the Deputy Minister's actions and, where appropriate, face possible sanctions.

The sanctions faced by a Minister in the event of poor or improper behaviour are political and could include demotion in Cabinet by the Prime Minister or resignation/dismissal from Cabinet. Grievous misconduct could lead to a motion of no confidence in the Government.

Even though responsibility may have been conferred directly on individual public servants (on immigration or customs officials, for example, or on Deputy Ministers under the terms of the *Financial Administration Act*), thereby creating personal professional accountability, the professional accountability of public servants is to their superiors and, in the case of Deputy Ministers, to their Ministers and, ultimately, to the Prime Minister. Public servants are answerable to parliamentary committees—with a duty to inform and explain—but they are not accountable to parliamentary committees. They cannot be dragged into a political discussion of the relative merits of policy options, for to do so would undermine their political neutrality and their capacity to retain the confidence of their Ministers. Similarly, Deputy Ministers cannot be asked to divulge the advice they gave to their Ministers, for to do so would jeopardize the relationship of trust between Deputy Ministers and Ministers.

Arthur Kroeger told the Public Accounts Committee in 2005: "A claim that is sometimes heard is that the real purpose of the convention of ministerial responsibility is to safeguard officials from being tagged for their own mistakes. In fact, however, the truth is the exact opposite. The purpose of the convention of ministerial responsibility is to preserve the authority of Ministers. The convention is a standing reminder to officials of who is in charge. It is a reminder that I would be wary of dispensing with."[76]

Sanctions for poor or improper behaviour by public servants can and do occur within the Government's mandate to manage the public service. As John Tait observed, "Sanctions can be and regularly are brought to bear, just as they are in the private sector. In both the public and private sectors, however, such actions are normally taken in private. In most cases, no purpose is served, and much damage can be done, by public hangings."[77] This view was echoed by Kroeger: "During my years in government I knew a substantial number of Deputies, Assistant Deputy Ministers and other officials whose careers were damaged or ended because of mistakes they had made. The fact that public executions are not the norm in the Public Service does not mean that the sanctions are not effective."[78]

Of course, the professional accountability of public servants leads not only to sanctions for bad behaviour but also to rewards for superior or excellent performance. The Performance Management Program provides an instrument for measuring behaviour on the basis of the performance agreement established as a mutual understanding between a Deputy Minister and the Clerk of the Privy Council. At the end of the annual cycle, the Clerk seeks input on the performance of the Deputy Minister from a variety of sources, including Ministers, the Committee of Senior Officials, the Treasury Board Secretariat and senior management of the Privy Council Office. A performance rating is assigned and, where appropriate, a performance award is approved by the Governor in Council.

Deputy Ministers have many complex responsibilities. On the issue of financial administration, they are supported by a Chief Financial Officer, who has a specific mandate to ensure that there is an adequate system of internal control and audit, including procedures and records, certification to authorize payments and adequate records respecting public property. In 2003, the Treasury Board developed the *Management Accountability Framework*, which sets out management expectations respecting Deputy Ministers. It is a relatively new tool, and it seeks to provide a vision of sound public management and managerial accountability, to enhance the monitoring and oversight of departments and to determine the consequences of management performance. To strengthen financial controls, monitoring and enforcement mechanisms to reinforce the sound stewardship of public funds, the Office of the Comptroller General was re-established at the Treasury Board Secretariat in December 2003.

These measures are designed to strengthen the internal audit and control of financial management within a department. A separate issue arises when a Minister directs a Deputy Minister to employ funds in a way the Deputy deems inappropriate. The informal but well-established procedure in Canada is for the Deputy Minister to have a frank and firm discussion with the Minister on why he or she should not proceed as directed. If the Minister insists, the Deputy can communicate with the Clerk of the Privy Council, who could talk to the Prime Minister about it. As Kroeger said, "if your Minister wants to do something that's completely contrary to Government policy, or your Minister wants to do something which is going to cause the Government serious embarrassment, in a situation like that a Deputy would go and have a talk with the Clerk of the Privy Council. If the Clerk was fully informed, the Clerk could make a judgement, the Clerk could talk to the Prime Minister about it, and the Prime Minister could make a judgement about it. As long as it's not illegal, it doesn't contravene a regulation or a law, if it is a normal exercise of political discretion, then at the end of the day the Prime Minister or the Minister has the right to make the decision and to be held accountable for it."[78] If the Minister's directive is upheld, the Deputy Minister has a choice: implement it or resign.

The Canadian procedure has the following merits:

- It recognizes that both the Minister and the Deputy Minister are appointed by the Prime Minister, to whom both are accountable for the management of the department and the implementation of the collective policies of the Government, and it allows the Prime Minister to adjudicate.
- It has the potential to avert a problem before any action is taken.
- It respects the confidential nature of advice offered by the Deputy Minister to the Minister, advice that will not become public.
- It clearly ascribes responsibility to Ministers for the final decision.

As in most institutions, the effective operation of procedures depends on the personal qualities of the relevant actors. Deputy Ministers must be firmly committed to their responsibilities and prepared to speak the truth to those in power when dealing with their Ministers.

In addition to the internal procedures for financial accountability, Parliament has provided for an external mechanism of financial accountability. The *Auditor General Act* provides that the Governor in Council may appoint a qualified auditor to the office of Auditor General of Canada, to hold officer during good behaviour for a term of ten years, subject to removal by the Governor in Council on address of the Senate and the House of Commons. The independence of the Auditor General, who is an officer of Parliament and not of the Government, is strengthened by the statutory requirement that the salary be equal to that of a puisne judge of the Supreme Court of Canada. The Auditor

General must examine the *Public Accounts of Canada*, and any other statement the President of the Treasury Board or the Minister of Finance may present for audit, and express an opinion as to whether they present, fairly, information that is in accordance with stated accounting policies. The Auditor General must make an annual report to the House of Commons by December 31, and may make up to three additional reports in any year. Each report calls attention to anything of significance that should be brought to the attention of the House of Commons, including accounts that have not been faithfully and properly maintained; records, rules and procedures that are insufficient to safeguard and control public property; money that had been expended for purposes other than those for which it was appropriated by Parliament or expended without due regard to economy or efficiency; the absence of procedures to measure and report the effectiveness of programs; and money that has been expended without due regard to its environmental effects.

The reports of the Auditor General provide essential material to the Standing Committee on Public Accounts to enable it to hold the Government publicly to account for its management of public finances. To emphasize the independent and critical role to be played by the Committee, its chair has been an Opposition MP since 1958.

8 The British Accounting Officers

The description of the Accounting Officer's functions which follows is drawn from British sources and uses the British terminology, which on occasion uses "responsible" to indicate "accountable," and "accountable" to indicate "answerable," according to the definitions set out in the third section of this study.

In the United Kingdom, the permanent head of a department (the British equivalent of a Deputy Minister), at the time of appointment, is separately appointed by the Treasury as Accounting Officer for that department.[10] If additional accounting officers are needed, the permanent head is appointed as Principal Accounting Officer.

The appointment carries with it the "responsibility for accounting to Parliament" for the amounts voted to meet the department's annual Supply Estimates, according to the summary prepared by the United Kingdom Government. Upon appointment, each permanent head receives a copy of the Treasury's document "The Responsibilities of an Accounting Officer," which sets out, among other things, the procedure to be followed where a Minister overrules an Accounting Officer's advice on an issue of propriety or regularity or relating to the Accounting Officer's wider responsibilities for economy, efficiency and effectiveness.

Accounting Officers should ensure that:

- the resources available to their department are organized to deliver departmental objectives in the most economic, efficient and effective way, with full regard to regularity (i.e., in accordance with the legislation authorizing expenditures and receipts) and propriety (i.e., expenditures and receipts should be dealt with in accordance with Parliament's intentions);

- a sound system of internal control is maintained that supports the achievement of the department's policies, aims and objectives, with independent assurance provided by internal audit established and organized in accordance with the provisions of Government Internal Audit Standards;

- proper financial procedures are followed and suitable accounting records are maintained; and

- the public funds for which they are individually responsible are properly managed and safeguarded.

These functions do not seem to differ significantly from those attributed to Deputy Ministers in Canada by the *Financial Administration Act*. However, the British established a very formal — and often public — procedure for handling a ministerial override of advice from the permanent head. If the Minister in charge of the department is contemplating a course of action involving a transaction that the Accounting Officer considers would infringe the requirements of propriety or regularity, the Accounting Officer should set out in writing his or her objections to the proposal, the reasons for those objections, and his or her duty to notify the Comptroller and Auditor General should the advice be overruled. If the Minister decides, nonetheless, to proceed, the Accounting Officer should seek a written instruction from the Minister to take the action in question. Having received such an instruction, he or she must comply with it, but should then inform the Treasury of what has occurred and should also communicate the papers to the Comptroller and Auditor General without undue delay. Provided that this procedure has been followed, the Public Accounts Committee can be expected to recognize that the Accounting Officer bears no personal responsibility for the transaction.[31]

If a course of action contemplated by the Minister raises an issue not of formal propriety or regularity, but relating to the Accounting Officer's wider responsibilities for economy, efficiency and effectiveness, the Accounting Officer has the duty to draw relevant factors to the attention of the Minister—such as an assessment of the risks involved and the impact on value for money—and to advise in consequence. If the Accounting Officer's advice is overruled and the proposal is not one he or she would feel able to defend to the Public Accounts Committee as representing value for money, he or she should seek a written instruction from the Minister before proceeding (perhaps referring to the probability of a Public Accounts Committee investigation). The Accounting Officer must then comply with the instruction, but should inform the Treasury and communicate the request for the instruction and the instruction itself to the Comptroller and Auditor General without due delay.[32] In cases of extreme urgency, the advice and the instruction are recorded in writing immediately afterwards.

The Treasury description of the functions of the Accounting Officer notes: "In general, the rules and conventions governing appearances of officials before parliamentary committees apply to the Public Accounts Committee, including the general convention that civil servants do not disclose the advice given to Ministers. Nevertheless, in a case . . . concerning a matter of propriety or regularity, the Accounting Officer's advice, and its overruling by the Minister, would be disclosed to the Public Accounts Committee. In a case . . . where the advice of an Accounting Officer has been overruled in a matter not of propriety or regularity, but of prudent and economical administration, efficiency and effectiveness, the Comptroller and Auditor General will have made clear in the report to the Public Accounts Committee that the Accounting Officer was overruled. The Accounting Officer should, however, avoid disclosure of the terms of the advice given to the Minister, or dissociation from the Minister's decision. Subject where appropriate to the Minister's agreement, the Accounting Officer should be ready to explain the reasons for such a decision and may be called on to satisfy the Committee that all relevant financial considerations were brought to the Minister's attention before the decision was taken. It will then be for the Committee to pursue the matter further with the Minister if they so wish."[33]

It should be noted that British "ministerial directions" (the overruling of a permanent head by the Minister) are relatively rare. From 1981 to 2003 inclusive, there were only 37 of them (an average of 1.6 per year): most dealt with relatively minor matters and were not investigated by the British Public Accounts Committee.[34]

So, in cases of propriety and regularity—which are fairly objective criteria—the reasons given by the Accounting Officer, but overruled by the Minister, are made public. In the case of value for money—which is fairly subjective—the Committee may, in certain circumstances, be assured that all relevant considerations were brought to the Minister's attention. In both cases, it would appear that the objective is to determine whether the Minister had properly weighed the relevant considerations before deciding on action. In neither case is the permanent head—the

Accounting Officer—held accountable to the Public Accounts Committee according to the definition in the third section of this study: that is to say, the Accounting Officer cannot be instructed or directed by the Committee, nor can the Committee sanction or reward the Accounting Officer. Rather, the Accounting Officer is answerable, with a duty to inform and explain, but not to get embroiled in political debate or discussion that could undermine his or her neutrality.

This system seems to be straightforward, clear, neat and tidy, but perhaps it is not. A report of the Hansard Society Commission on parliamentary scrutiny in the United Kingdom reveals differences of interpretation about the precise meaning of "responsible" and "accountable."[15] The creation of the Commission itself indicates dissatisfaction with the capacity of Parliament to hold the Government to account: only 26.8% of British MPs, the Commission learned, thought that Parliament was quite or very effective at holding the Government to account for its actions.[16] Furthermore, the enormous scope of governmental activity means that the Public Accounts Committee can deal with only the tip of the iceberg: "The existence of the Public Accounts Committee and National Audit Office provides permanent oversight and has a deterrent effect on ministerial activity. However, the Public Accounts Committee has limitations. Even though the Public Accounts Committee already works at maximum capacity, publishes about 50 reports a year and meets twice a week for 25 weeks a year, it is only able to take a limited look at government expenditure, and pick up only a proportion of the National Audit Office's work. The enormous scope of government means that even with the resources of the National Audit Office, the Public Accounts Committee is necessarily highly selective in the inquiries it undertakes. The range of government activity means that neither the National Audit Office nor Public Accounts Committee can track all the money spent by Government."[17] However, anything is open to be scrutinized: this possibility, not the certainty of investigation, should incite political and professional actors to act properly.

Finally, all political and bureaucratic institutions operate through the agency of human beings, and, in the real world, "to err is human." There is no reason to believe that British public servants, including permanent heads, are not human and that, on occasion, they may err through inadvertence, negligence or even, or rare occasions, a hesitation to speak truth to those in authority, perhaps on issues dealing with economy, efficiency and effectiveness which may be subject to judgment.

9 Comparing the British and Canadian Practices

J.R. Mitchell has pointed out that the roles and accountabilities of permanent heads/Accounting Officers in the United Kingdom and Deputy Ministers in Canada are essentially the same.[68] In both systems:

- Ministers alone are accountable to the House of Commons for policy and the administration of government;

- public servants are accountable to their superiors, and permanent heads or Deputy Ministers are accountable to their respective Minister, whether for matters that have been delegated to them or that have been assigned to them directly by statute;

- permanent heads and Deputy Ministers must keep confidential the advice they provide to Ministers, with the sole exception that the report filed by a permanent head/Accounting Officer in the United Kingdom on a disagreement with the Minister on a matter of propriety or regularity may be made public if included in a report by the Auditor General;

- public servants, including permanent heads/Accounting Officers and Deputy Ministers, are answerable to parliamentary committees, but are not accountable to them (i.e., they are not subject to instruction, punishment or reward by the committees); and

- because officials, including permanent heads or Deputy Ministers, appear before parliamentary committees, they are not anonymous as physical human beings, but their role in the Government's

> decision-making process remains anonymous and, therefore, not accountable (although the Accounting Officer's reasons for disagreeing with a Minister's instruction in the area of propriety or regularity may be made public if included in a report of the Auditor General).

There are, however, some very important operational differences in the two countries: the British institution of the Accounting Officer has been operating for over 100 years, and in an institutional environment that is significantly different from that which obtains in Canada.

First, the British Public Accounts Committee enjoys great prestige and is composed of able and long-serving members, which encourages expertise and stability.[39] The Canadian Committee has frequent changes of personnel.

Second, the British Committee tends to adopt a non-partisan attitude in its work and seeks to reach dispassionate findings and recommendations whatever Government is in power.[40] Indeed, the Treasury Officer of Accounts, a governmental official, sits at the table during meetings of the Committee (as does the Auditor General) and can be called upon to answer questions in support of the Committee's investigation.[41] The British Committee seeks to clarify issues, not to apportion blame. The Canadian Committee, in contrast, is highly partisan.

While Britain has tended to enjoy majority governments over the last half century, the kind that normally allow the Government to have predictable support in the House of Commons and in its committees, Canada has had seven minority governments during the same period. Minority government makes legislative management less predictable.

The major difference, of course, is the way in which differences in the area of financial administration between a Minister and a permanent head or Deputy Minister are handled. In Britain, if, after discussion between the permanent head and the Minister, the Minister directs the permanent head to act in a manner that he or she has advised against doing, the permanent head—as Accounting Officer—must comply, while transmitting to the Treasury and the Auditor General the written instruction and the contrary advice. The principal difficulty with this approach is that the Minister—who is, naturally, accountable—secures immediate action on something that may be questionable or improper. The Accounting Officer's report is an *ex post facto* explanation of advice offered, but it does not avoid the action. The second difficulty is that, while the Accounting Officer's report may become public in matters involving propriety or regularity, it does not appear to have any impact on the Minister's accountability: How many Ministers in the United Kingdom have been punished following the examination of an Accounting Officer's report advising against action that violated the principles of propriety or regularity? The Public Accounts Committee tends to recommend corrective action or improved behaviour.

The Canadian approach is more immediate and has the potential for avoiding improper action before it can be taken. If, in discussions between the Minister and the Deputy Minister, the Deputy Minister becomes aware that the Minister is contemplating action that would offend against propriety, regularity, value for money or the general policies of the Government, the Deputy Minister can communicate immediately with the Clerk of the Privy Council, who can intervene on behalf of the Prime Minister or ask the Prime Minister to speak with the Minister with a view to ensuring that improper action does not occur. This informal and private procedure has the added advantage of ensuring that the advice of the Deputy Minister does not take the form of a written document (as in Britain), which, if made public, the highly partisan Canadian Public Accounts Committee could use to envenom the relations between the Minister and the Deputy Minister and undermine, thereby, the relationship of trust Gordon Osbaldeston said was so important to nurture. If, in the Canadian case, the Deputy Minister's advice is ultimately overridden, he or she has the option of resigning rather than implementing the decision of the Minister.

Of course, the Canadian system also works in reverse. There is nothing to prevent a Minister who is unhappy, for whatever reason, with the performance of his or her Deputy Minister from speaking to the Prime Minister or the Clerk of the Privy Council. It is the Prime Minister who appoints both the Minister and the Deputy Minister, and it is wholly appropriate that the Prime Minister should be the ultimate arbiter.

10 Conclusion

It is important to be clear: the Government is responsible for the executive government of Canada and is accountable to the House of Commons for it. The role of the House of Commons is to hold the Government to account for its management, not to manage.

In both the United Kingdom and Canada, permanent heads/Accounting Officers and Deputy Ministers are answerable to parliamentary committees, but they are not accountable to them (not even for responsibilities for financial management which have been conferred on them directly by legislation). An apparent aberration in the United Kingdom—the publication of an Accounting Officer's report on why a Minister was advised not to act in a manner that offended propriety or regularity—is not intended to hold the Accounting Officer to account, but rather to determine whether the Minister was fully aware of the pertinent concerns when he or she took the decision.

The British Accounting Officer operates in a very different environment from that which prevails in Canada: the British Public Accounts Committee has a highly stable membership and a non-partisan approach to its work, and it seeks to clarify issues, not to apportion blame; the Canadian Committee has frequent changes in membership, is highly partisan and often seems concerned with apportioning blame. In the

United Kingdom, the Accounting Officer's report merely records advice after the decision has been taken and the damage done; the Canadian practice of seeking the intervention of the Clerk of the Privy Council or the Prime Minister has the potential for averting action before any damage can be done.

Adoption of the British institution of Accounting Officer in Canada appears to be problematic. First of all, it would involve the abolition of the current Canadian practice of allowing the Deputy Minister to seek the intervention of the Clerk of the Privy Council or the Prime Minister and, perhaps, avert improper action. Otherwise, if the Deputy Minister were unsuccessful in convincing the Minister not to take a certain action, would it have to be assumed that the Deputy Minister had also been unsuccessful in convincing the Clerk of the Privy Council and, perhaps, the Prime Minister when, as Accounting Officer, he or she filed an *ex post facto* report with the Auditor General? If the two systems worked in tandem, there would be enormous—and unacceptable—confusion about roles, Cabinet confidences and the operation of Cabinet government; in addition, how does one "abolish" a procedure which, while publicly acknowledged, is conventional, informal and not subject to public scrutiny? Furthermore, adopting the Accounting Officer in Canada without completely reforming the environment in which the Canadian Public Accounts Committee operates (less stable membership and highly partisan attitudes) would be to adopt only half of the institutional arrangements in Britain and would be problematic (particularly if a partisan Committee used an Accounting Officer's report to envenom his or her relations with the Minister). It seems unlikely in the foreseeable future that the environment in which the Canadian Committee operates will change radically.

On balance, it is not recommended that the British institution of Accounting Officer be adopted in Canada.

Canada's system of government and of accountability has, on the whole, worked well over the past half century. It has, on occasion, broken down, most flagrantly in the case of the Sponsorship program and advertising activities. It may well be that human factors were at issue: a belief that political requests are to be acted upon without question, a failure to speak truth to those in power, negligence, a lack of respect for the hierarchical chain of command within the public service, and an improper grasp of the centrality of values and ethics to the Canadian system of government. In such circumstances, there is no reason to believe that the existence of Accounting Officers in the Government of Canada would have changed the outcome.

A useful and pressing response to the Sponsorship issue would be to ensure, on the one hand, that Ministers, on appointment, and their exempt staff are properly briefed on the respective roles and responsibilities of political and professional actors and the need to respect the office of the Deputy Minister as the bridge between them; on the need for propriety, regularity and value for money in public expenditures; and on the centrality of values and ethics in the operation of Canada's system of responsible parliamentary government. On the other hand, Deputy Ministers (in their performance agreements) and public service managers, through instructions, courses or training, should be impressed with the centrality of values and ethics in the operation of Canada's system of responsible parliamentary government, the need to speak truth to those in power, and the importance of propriety, regularity and value for money in the public finances; these issues should be key components in the Performance Management Program for Deputy Ministers and in the performance evaluation of public service managers.

In the last analysis, public servants are answerable to parliamentary committees, but they are accountable for the exercise of their responsibilities to their superiors, and the Deputy Minister is accountable to the Minister. The Minister is responsible for the department and is accountable to the House of Commons for the exercise of that responsibility. If it is not reasonable to suppose that the Minister was aware of unacceptable action (or inaction) taken by public servants, the Minister must direct that corrective measures be taken in a timely fashion: thus, ultimately, accountability (and, potentially, blame) lies with the Minister, and sanctions for unacceptable performance are political and public. When unacceptable behaviour by a public servant has been identified, sanctions are applied within the Public Service and are normally private.

Endnotes

* The author was a professor of political science at the University of Ottawa, 1967-75, the founding Director of the Parliamentary Internship Program in the Canadian House of Commons, 1969-75, and a constitutional advisor in the Privy Council Office, 1975-2001. When quotations are used in this study, the author has taken the liberty of ensuring that spelling, the use of capital letters and the absence of acronyms is consistent with the rest of the study.

[1] R. MacGregor Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1964), pp. 18-19.

[2] D.L Keir., *The Constitutional History of Modern Britain Since 1485* (London: Adam and Charles Black, 1961), pp. 487-90.

[3] Christopher Moore, *1867 — How the Fathers Made a Deal* (Toronto: McClelland & Stewart, 1997), p. 7.

[4] James Ross Hurley, *Amending Canada's Constitution* (Ottawa: Minister of Supply and Services Canada, 1996), p. 14.

[5] Dawson, *The Government of Canada*, p. 273.

[6] Peter Aucoin, "Independent Foundations, Public Money and Public Accountability: Whither Ministerial Responsibility as Democratic Governance?" *Canadian Public Administration* 46 (1) (2003): 24.

[7] Donald Savoie, "Searching for Accountability in a Government Without Boundaries," *Canadian Public Administration* 47 (1) (2004): 20.

[8] Ibid., p. 12.

[9] James Ross Hurley, " Le parlementarisme canadien et le fédéralisme exécutif ", in Manon Tremblay et al., dir., *Le parlementarisme canadien* (Québec : Les Presses de l'Université Laval, 2000), p. 309.

[10] John C. Tait, chair, *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics* (Ottawa: Canadian Centre for Management Development, 2000), p. 29.

[11] See the exchange between Donald J. Savoie and Sandford Borins in *Canadian Public Administration* 38 (1) (1995): 112-38.

[12] Ibid., p. 118.

[13] Paul Thomas, "Ministerial Responsibility and Administrative Accountability," in Mohamed Charih and Arthur Daniels, *New Public Management and Public Administration in Canada* (Toronto: The Institute of Public Administration of Canada, 1997), p. 143.

[14] Peter Aucoin, *The New Public Management: Canada in Comparative Perspective* (Montreal: Institute for Research on Public Policy, 1995), p. 217.

[15] Privy Council Office, *Responsibility in the Constitution* (Ottawa: Minister of Supply and Services, 1993), p. 3.

[16] Ibid.

[17] Canada, *Guidance for Deputy Ministers* (Ottawa: Privy Council Office, 2003), p. 1.

[18] Ibid., p. 3.

[19] Canada, *Governing Responsibly* (Ottawa: Privy Council Office, 2004), p. 3.

[20] Ibid.

[21] Tait, *A Strong Foundation*, p. 9.

[22] Ibid.

[23] Gordon Robertson, *The Changing Role of the Privy Council Office* (Ottawa: Information Canada, 1971), p. 20.

[24] Arthur Kroeger, "Unedited Copy of Evidence of the Standing Committee on Public Accounts," February 21, 2005, pp. 13-14.

[25] Gordon Osbaldeston, "Job Description for DMs," in *Policy Options Politiques*, January/janvier 1988, p. 33. See also Gordon F. Osbaldeston, *Keeping Deputy Ministers Accountable* (Toronto: McGraw-Hill Ryerson, 1989).

[26] Arthur Kroeger, "Statement Provided to the Public Accounts Committee of the House of Commons," February 21, 2005, p. 2.

[27] Tait, *A Strong Foundation*, p. 10.

[28] Kroeger, "Statement," p. 2.

[29] Kroeger, "Unedited Copy," p. 15.

[30] The description of the role and responsibilities of the Accounting Officer are set out in http://www.government-accounting.gov.uk/current/content/ga_04_1.htm (and _04_4.htm).

[31] Ibid., 4.htm, para. 16.

[32] Ibid., para. 17.

[33] Ibid., para, 30.

[34] C.E.S. Franks, "Responsibility and Accountability: The Accounting Officer Approach," submission to the Senate Committee on National Finance, June 7, 2005, p. 8.

[35] Rt. Hon. Lord Newton of Braintree, chair, *The Challenge for Parliament: Making Government Accountable* (London: Vacher Dod Publishing, 2001); see pp. 118-20, for example.

[36] Ibid., p. 10.

[37] Ibid., p. 65.

[38] J.R. Mitchell, "Reply to C.E.S. Franks," *Canadian Public Administration* 40 (4) (1997): pp. 653-57.

[39] C.E.S. Franks, "Accountability to Parliament for Financial Matters in the British System," December 8, 2004.

[40] Ibid., p. 21.

[41] Ibid., pp. 20-21.

Bibliography

Aucoin, Peter. *The New Public Management in Comparative Perspective*. Montreal: Institute for Research on Public Policy, 1995.

Borins, Sanford. "The New Public Management Is Here to Stay," and "A Last Word," *Canadian Public Administration* 38 (1) (1995).

Bourgault, Jacques, et al., eds. *Public Administration and Public Management – Experiences in Canada*. Sainte-Foy: Les Publications du Québec, 1997.

Canada. *Governing Responsibly*. Ottawa: Privy Council Office, 2004.

Canada. *Guidance for Deputy Ministers*. Ottawa: Privy Council Office, 2003.

Charih, Mohamed, and Arthur Daniels. *New Public Management and Public Administration in Canada*. Toronto: Institute of Public Administration of Canada, 1997.

Dawson, R. MacGregor. *The Government of Canada*. Toronto: University of Toronto Press, 1964.

Franks, C.E.S. "Accountability to Parliament for Financial Matters in the British System," December 8, 2004, unpublished paper.

Franks, C.E.S. "Not Anonymous: Ministerial Accountability and the British Accounting Officers." *Canadian Public Administration* 40 (4) (1997): 626-52.

Franks, C.E.S. "Responsibility, Accountability, and the Sponsorship Affair." Submission to the Public Accounts Committee, May 2004.

Franks, C.E.S. "Responsibility and Accountability: The Accounting Officer Approach." Submission to the Senate Committee on National Finance, June 7, 2005.

Hurley, James Ross. *Amending Canada's Constitution*. Ottawa: Minister of Supply and Services Canada, 1996.

Keir, D.L. *The Constitutional History of Modern Britain since 1485*. London: Adam and Charles Black, 1961.

Kroeger, Arthur. "Statement Provided to the Public Accounts Committee of the House of Commons," February 21, 2005.

Kroeger, Arthur. "Unedited Copy of Evidence of the Standing Committee on Public Accounts," February 21, 2005.

Marshall, Geoffrey, ed. *Ministerial Responsibility*. Oxford: Oxford University Press, 1989.

Mitchell, J.R. "Reply to C.E.S. Franks." *Canadian Public Administration* 40 (4) (1997): 653-57.

Moore, Christopher. *1867 — How the Fathers Made a Deal.* Toronto: McClelland & Stewart, 1997.

Newton of Braintree, Lord, chair. *The Challenge for Parliament: Making Government Accountable*. Report of the Hansard Society Commission on Parliamentary Scrutiny. London: Vacher Dod Publishing, 2001.

Osbaldeston, Gordon. "Dear Minister." *Policy Options Politiques*, June/juin 1988.

Osbaldeston, Gordon. "Job Description for DMs." *Policy Options Politiques*, January/janvier 1988.

Osbaldeston, Gordon F. *Keeping Deputy Ministers Accountable*. Toronto: McGraw-Hill Ryerson, 1989.

Privy Council Office. *Responsibility in the Constitution*. Ottawa: Minister of Supply and Services, 1993.

Robertson, Gordon. *The Changing Role of the Privy Council Office*. Ottawa: Information Canada, 1971.

Royal Commission on Financial Management and Accountability. *Final Report*. Hull: Minister of Supply and Services Canada, 1979.

Royal Commission on Government Organization. *Volume 1: Management of the Public Service*, vol. 1. Ottawa: The Queen's Printer, 1962.

Savoie, Donald J. "Searching for Accountability in a Government Without Boundaries." *Canadiand Public Administration* 47 (1) (2004).

Savoie, Donald J. "What Is Wrong with the New Public Management?" and "Just Another Voice from the Pulpit." *Canadian Public Administration* 38 (1) (1995).

Tait, John C., chair. *A Strong Foundation: Report of the Task Force on Public ServiceValues and Ethics*. Ottawa: Canadian Centre for Management Development, 2000.

Tremblay, Manon, et al., dir. Le parlementarisme canadien. Québec : Les Presses de l'Université Laval, 2000.
www.government-accounting.gov.uk/current/content/ga_04_1.htm (and _04_4.htm).

THE RESPECTIVE RESPONSIBILITIES AND ACCOUNTABILITIES OF MINISTERS AND PUBLIC SERVANTS: A STUDY OF THE BRITISH ACCOUNTING OFFICER SYSTEM AND ITS RELEVANCE FOR CANADA

C.E.S. (Ned) Franks

1 The British Accounting Officer System

1.1

British Accounting Officers

Britain has had Accounting Officers since 1872, when the Treasury concluded that the "permanent chiefs" (Deputy Ministers in Canadian terms) of departments, rather than "temporary" Ministers, should be the persons to sign the accounts of the government, as required by the *Exchequer and Audit Act* of 1866. This Act remained the sole statutory base for British Accounting Officers until 2002. The *Government Resources and Accounts Act* of that year requires the Treasury to appoint Accounting Officers for each "Vote" in the estimates; these officers in turn prepare the accounts and transmit them to the Comptroller and Auditor General.

Accounting Officers occupy a central role in the British system of financial control. They hold responsibility in their own right and are also the responsible witnesses before the Public Accounts Committee. Though the Committee may call Ministers as witnesses, it does not normally do so. Its concern is with the Accounting Officers, and much of its work since the Permanent Secretaries were first designated as Accounting Officers has been directed towards defining and strengthening their position as the senior civil servants responsible for the good conduct of financial administration.

1.1.1 The Roles and Responsibilities of Accounting Officers

The British Treasury describes the responsibilities and duties of Accounting Officers in formidable terms:

> The appointment of the permanent head of a department as its Principal Accounting Officer reflects the fact that under the minister he or she has personal responsibility for the overall organization, management, and staffing of the department and for department-wide procedures, where these are appropriate, in financial and other matters. The permanent head must ensure that there is a high standard of financial management in the department as a whole; that financial systems and procedures promote the efficient and economical conduct of business and safeguard financial propriety and regularity throughout the department; and that financial considerations are fully taken into account in decisions on policy proposals. . . .

> The essence of an Accounting Officer's role is a personal responsibility for the propriety and regularity of the public finances for which he or she is answerable; for the keeping of proper accounts; for prudent and economical administration; for the avoidance of waste and extravagance; and for the efficient and effective use of all the available resources.[1]

As an acknowledgement of this personal responsibility, Accounting Officers must "sign the accounts . . . assigned to [them], and in doing so accept personal responsibility for their proper presentation as prescribed in legislation or by the Treasury." They must also ensure that proper financial procedures are followed, "that public funds are properly and well managed," and that, in considering proposals for expenditures, the value for money of the proposal is assessed in accordance with principles set out by the Treasury. Where necessary, such considerations should be brought to the attention of the Ministers (all para. 7). Accounting Officers also have "a particular responsibility for ensuring compliance with parliamentary requirements in the control of expenditure. A fundamental requirement is that funds should be applied only to the extent and for the purposes authorized by Parliament" (para. 13).

The essential core of their responsibilities remains regularity and propriety, along with ensuring value for money. British Accounting Officers appear before the Public Accounts Committee as the holders of responsibility in their own right. Theirs is a personal responsibility, which cannot be delegated: "In practice, an Accounting Officer will have delegated authority widely, but cannot on that account disclaim responsibility" (para. 28).

1.1.2 Regularity, Propriety and Value for Money

The responsibilities of the Accounting Officers, the scope of audit by the British Comptroller and Auditor General, and the work of the Public Accounts Committee are directed towards regularity, propriety and value for money in financial management. Issues of regularity and propriety have concerned the Committee since the 19th century; value for money is a more recent and still evolving concern.

> *Regularity* according to the Treasury "is about compliance with appropriate authorities." [It] . . . is the requirement for all items of expenditure and receipts to be dealt with in accordance with the legislation authorising them, any applicable delegated authority and the rules of Government Accounting.[7]

Expenditures must fit within both the terms of the authorizing legislation and Parliament's intentions as expressed in that legislation. They must also fit within the ambit of the relevant "Vote" and be in accordance with regulations issued under the governing legislation. Regularity is a straightforward matter of complying with the rules.

> *Propriety* is a more complex and less clear-cut matter than regularity: Whereas regularity is concerned with compliance with appropriate authorities, propriety goes wider than this and is concerned more with standards of conduct, behaviour and corporate governance. It is concerned with fairness and integrity and would include matters such as the avoidance of personal profit from public business, even-handedness in the appointment of staff, open competition in the letting of contracts and the avoidance of waste and extravagance.[8]

Propriety encompasses "not only financial rectitude, but a sense of the values and behaviour appropriate in the public sector."

The Treasury recognizes that it is not easy to define neatly what constitutes "proper" behaviour as demanded by the standard of propriety. To assist Accounting Officers in determining whether a proposed course of action meets this standard, the Treasury suggests it should pass these tests:

- it follows the rules and seeks approval where this is required;
- it puts in place and follows clear procedures;
- it resolves any conflict of interests;
- it does not use public money for private benefit;
- it is even-handed;
- there are records; and
- it is transparent—it can accept scrutiny.[4]

The Treasury adds that if any of these tests raises a question about the proposed course of action, there is one key test to apply: *Could I satisfactorily defend this action before the Public Accounts Committee?* And, "since accountability to Parliament is part of a wider accountability, the question might be put even more simply": *Could I satisfactorily defend this course of action in public?*

The Treasury and the Public Accounts Committee demand a sense of propriety on the part of accounting officers and others involved in financial management. It is not sufficient to follow the letter of rules and statutes, though that is essential to meet the standard of regularity. Propriety demands something more: a commitment to ethical standards, and obligations to be careful stewards of the public purse.

Value for money, according to the National Audit Office, involves three criteria:

- Economy: minimizing the cost of resources used or required—spending less.
- Efficiency: the relationship between the output from goods or services and the resources to produce them—spending well.

- Effectiveness: the relationship between the intended and the actual results of public spending—spending wisely.[5]

The Treasury recognizes that value-for-money issues can be less clear cut than issues of regularity and propriety. The Treasury's *Value for Money Assessment Guidance* devotes its 41 pages to just one part of the problem: "appraising the value for money of investment proposals to be procured under the Private Finance Initiative."[6] A value-for-money assessment can involve determining "the optimum combination of whole life cost and quality (or fitness for purpose) to meet the user's requirement, and does not always mean choosing the lowest cost bid. It should not be chosen to secure a particular balance sheet treatment."[7]

Value-for-money audits in Britain do not intrude into questions about the merits of policies. The British *National Audit Act* of 1983 specifically prohibits the Comptroller and Auditor General from questioning the merits of particular policies. Value-for-money audits are examinations of the economy, efficiency and effectiveness with which agencies have used their resources in discharging their functions.[8]

1.1.3 Accounting Officers for Horizontal (Joined-Up) Initiatives

The British Government has endorsed "holistic" government in the belief that "many of the most deep-seated or intractable problems of modern government—such as, for example, crime, social exclusion and the fragmentation of communities—cut across the traditional lines of Whitehall departments. They required, therefore, a coordinated attack between departments at the centre, and between central government, local authorities and other local agencies."[9] A special unit has been set up in the Cabinet office to secure such coordination.

The Treasury has responded to the special problems for accountability posed by these joined-up activities by insisting that at least one Accounting Officer, and sometimes more, must be appointed for each horizontal initiative. The senior Accounting Officer, the Permanent Secretary, has the responsibility for ensuring that the appropriate Accounting Officers are appointed:

> An Accounting Officer may share with another Accounting Officer responsibility for a joined-up service or for the achievement of a target which depends on the success of separate services. Similarly, a senior official could serve as an Additional Accounting Officer both in his or her parent department and one or more other department for this purpose. The lines of responsibility in all such cases should be designed to support the effective delivery of the service and clearly defined in terms which align responsibility and accountability, so clarifying what each Accounting Officer or Additional Accounting Officer is responsible and accountable for. It will usually be beneficial to set out these arrangements in a Memorandum of Understanding between the departments concerned.[111]

These Treasury prescriptions are flexible, as they must be in light of the varied sorts of arrangements of different government departments, levels of government and public agencies a joined-up program might take. Nevertheless, the bottom line is that, for horizontal activities, as for others, Accounting Officers must be appointed, and these officers must have as due regard for regularity, propriety and value for money in these activities as they would in their own department's program and money.

1.1.4 The Variety and Number of British Accounting Officers

With the growth in the complexity and size of government, the number and variety of British Accounting Officers have increased. Permanent Secretaries remain the principal departmental Accounting Officers, but a department can have many more. These additional Accounting Officers come in several varieties. Twenty-five civil servants in the United Kingdom Government with the grade of Permanent Secretary, and 15 with the grade of Second Permanent Secretary, are designated as Accounting Officers by the Treasury. The Treasury also appoints some officials below the rank of Permanent Secretary, or with other titles, as Accounting Officers in respect of particular parts of a department's resource accounts. At present a total of 70 departmental Accounting Officers have been appointed by the Treasury.

The need for so many Accounting Officers compared with Permanent Secretaries is understandable in the context of the structure of modern government departments. Many departments are more of an administrative empire than a single united hierarchical organization. The separate units might require their own Accounting Officer.

British Permanent Secretaries appoint an additional 30 or so Accounting Officers for votes within departments. The responsibilities of these Accounting Officers are usually carried alongside other financial accountabilities. Britain also has 87 executive agencies (equivalent to special operating agencies in Canada), each of which has its own Accounting Officer. Sixty-five of these Accounting Officers for executive agencies are appointed by the host department's permanent secretary, and the remaining 22 by the Treasury. When an agency has its own Request for Funds (or Vote in Canadian terms), or is a trading fund (one which nets out expenses and revenues and is not supported by a parliamentary vote), the Treasury appoints the Chief Executive of the agency as Accounting Officer in the normal way. But "where an agency remains part of a department and is financed from one or more subheads in a departmental Estimate, it is for the Principal Accounting Officer to designate the Chief Executive Officer as agency Accounting Officer."[11] In addition, approximately 210 Non-Departmental Public Bodies have Accounting Officers designated by the sponsor department. All these Accounting Officers are accountable before the Public Accounts Committee.

The major nationalized industries and large government corporations are not audited by the National Audit Office and do not have Accounting Officers. These exemptions include the BBC, the Post Office, and the Bank of England. The performance of these bodies is reviewed by the parliamentary departmental select committees of the House of Commons, but not by the Public Accounts Committee.

An added wrinkle to this structure of Accounting Officers comes with smaller agencies, such as hospitals and other organizations under the National Health Service, which are audited by the National Audit Office. These numerous agencies have "Accountable Officers," and these officers too can appear before the Public Accounts Committee.

1.1.5 The Permanent Secretaries

The British Permanent Secretaries are the senior Accounting Officers among the extensive group described in the previous section. Their centrality warrants a look at their career paths both within the civil service and as Permanent Secretaries. These profiles differ substantially from those of their Canadian counterparts, the Deputy Ministers. In the years 1979-94:

- British Permanent Secretaries normally served 25 to 30 years in the civil service before being appointed to that position.
- Three-quarters were 50 years old or older at the time of their promotion to the Permanent Secretary level.
- The normal tenure of a Permanent Secretary in a single department was three to six years; 63% had served more than three years as Permanent Secretary in the department in which they served; 21% had served more than five years in a single department.
- Half of all appointments to Permanent Secretary were filled from within the department. Most Permanent Secretaries have had previous experience within their department.

- Promotion to the rank of Permanent Secretary usually comes towards the end of a civil service career and is the last position held before retirement, though a minority holds at least two positions at the Permanent Secretary level.[12]

The length of tenure in a single post has an important consequence for the role of British Permanent Secretaries as Accounting Officers: normally they remain in a post long enough for them to come before the Public Accounts Committee to defend actions they themselves took. In Britain, as in Canada, the current holder of the post, not previous holders, serves as the responsible and accountable witness before the Committee. The Treasury states that, by convention, the incumbent Accounting Officer does not "decline to answer questions where the events took place before taking up appointment; the Committee may be expected not to press the incumbent's personal responsibility in such circumstances."[13]

Peter Barberis estimates that the time needed for a new Permanent Secretary to come up to full utility is about three years, though it could be significantly less if the appointee had previous experience within the department, especially, as commonly happens, if the new appointee is actually serving within the department at the time of elevation to the Permanent Secretary position. He draws "a crude line of demarcation" marking "a minimum of sufficiency" at "five years of previous service and five years' tenure" as Permanent Secretary in a department. The Chief Executives and Accounting Officers for executive agencies normally serve less than a five-year contract.

The British Government states that the duty of the individual civil servant is first to the Minister of the Crown who is in charge of the department in which he or she is serving. Barberis wonders if there has been "an undue obsequiousness among top civil servants" and comments that there is "a widespread belief that if top civil servants have any case to answer for in recent years it is an excessive willingness to please Ministers."[14] He identifies other "loyalties" ("multiple accountabilities" is the equivalent Canadian term) of Permanent Secretaries which attenuate this loyalty to Ministers. One is a specific loyalty to Parliament in connection with the regularity and economy, efficiency and effectiveness of expenditures. Here "the Permanent Secretary, as an Accounting Officer, [has] the formal authority to register a note of dissent" from ministerial decisions. In questions of financial probity Permanent Secretaries can and do stand up to ministers.

Another loyalty is to the Government of the day. This long tradition has found formal expression in the *Civil Service Code* of 1999:

- The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government of the United Kingdom, the Scottish Executive or the National Assembly for Wales constituted in accordance with the Scotland and Government of Wales Acts 1998, whatever their political complexion, in formulating their policies, carrying out decisions and in administering public services for which they are responsible.

- Civil servants are servants of the Crown. Constitutionally, all the Administrations form part of the Crown and, subject to the provisions of this Code, civil servants owe their loyalty to the Administrations in which they serve.

"Serving the Minister" comes several paragraphs later in the Code, where it is found together with the duty to act in a way that would not harm the civil servant's ability to serve future governments of a different political stripe.

Some in Britain have argued that Permanent Secretaries owe a loyalty to the Prime Minister through the head of the home civil service, but this idea has little support. What has found support, Barberis says, is the belief "that civil servants, Permanent Secretaries in particular, should have if not a higher formal loyalty [to the Crown or nation] then a set of higher ideals as their touchstone." British Permanent Secretaries may not, as Peter Hennessy claims, form a "College of Cardinals," but there is every indication that, in comparison with their Canadian counterparts, they spend more time on departmental matters, have a longer connection with their department, have more personal responsibility and accountability for their department and for administration of their department, and consider Parliament one of the key forums in which they are held accountable.

1.2

Ministerial Directions: The Process for Overruling British Accounting Officers

Britain has established procedures which allow a Minister to overrule an Accounting Officer when the Accounting Officer objects to a course of action proposed by the Minister. These overrulings are termed "ministerial directions." The procedures for ministerial directions ensure that, though Accounting Officers hold responsibilities in their own right, their personal responsibility and their accountability before the Public Accounts Committee does not violate the principle of ministerial responsibility. The importance of this preservation of ministerial responsibility is recognized in the British Government's definitive statement about responsibility in the Constitution:

> A Permanent Head of a Department giving evidence to the Committee of Public Accounts does so by virtue of his duties and responsibilities as an Accounting Officer as defined in the Treasury memorandum on *The Responsibilities of an Accounting Officer*, but this is without prejudice to the Minister's responsibility and accountability to Parliament in respect of the policies, actions and conduct of his Department.[15]

1.2.1 The Process for Ministerial Directions

The formal process for "ministerial directions" is described in the Treasury's *Responsibilities of an Accounting Officer*:

> If the Minister in charge of a department is contemplating a course of action involving a transaction which the Accounting Officer considers would infringe the requirements of propriety and regularity (including where applicable the need for Treasury authority), the Accounting Officer should set out in writing his or her objections to the proposal, the reasons for those objections and his or her duty to notify the C&AG should the advice be overruled. If the minister decides, none the less, to proceed, the Accounting Officer should seek a written instruction to take the action in question. Having received such an instruction, he or she must comply with it, but should then inform the Treasury of what has occurred, and should also communicate the papers to the C&AG without undue delay. Provided that this procedure has been followed, the PAC can be expected to recognize that the Accounting Officer bears no personal responsibility for the transaction. *(para. 16)*
>
> If a course of action in contemplation raises an issue not of formal propriety or regularity but relating to the Accounting Officer's wider responsibilities for economy, efficiency and effectiveness as set out in paragraph 6, the Accounting Officer has the duty to draw the relevant factors to the attention of his or her minister and to advise in whatever way he or she deems appropriate. Such factors may include an assessment of the risks associated with the proposed action and the impact these would have on the value for money provided by the action should some or all of these materialize. If the Accounting Officer's advice is overruled and the proposal is one which he or she would not feel able to defend to the PAC as representing value for money, he or she should seek a written

> instruction before proceeding. He or she will no doubt wish to refer to the possibility of a PAC investigation. He or she must then comply with the instruction, but should inform the Treasury and communicate the request for the instruction and the instruction itself to the C&AG without undue delay, as in cases of propriety or regularity. *(para. 17)*

Clearly, there is no question of who holds the responsibility. Unless formally overruled through this process by the Minister, the Accounting Officer personally holds the responsibility; if the Minister overrules the Accounting Officer, then the Minister, not the Accounting Officer, is responsible and accountable.

The Accounting Officer initiates the process by objecting to a course of action proposed by the Minister which the Accounting Officer believes infringes the requirements of propriety and regularity or raises issues relating to value for money. The Minister and the Accounting Officer thoroughly discuss all relevant factors before a ministerial direction is issued. These discussions are confidential and are not disclosed unless the Minister so directs. The Treasury emphasizes that, for value-for-money disagreements especially, all relevant factors must be discussed. Value-for-money issues can be less clear cut than issues of regularity and propriety: "Value for money is not the lowest price: it is the optimum combination of whole life costs and quality to meet the user's requirement."[16] Most of the ministerial directions in recent years have been about value-for-money matters, and, similarly, the British Public Accounts Committee has devoted its time to these matters.

The Accounting Officer objects to the Minister in writing only after discussion has failed to deter the Minister from a course of action. There can be good reasons for a Minister's insistence. The Minister might overrule the Accounting Officer on grounds of a principle, such as the national interest, which the Minister feels transcends, for the matter at hand, the rules that the Accounting Officer must observe. Once the Comptroller and Auditor General receives this correspondence, he or she discusses the ministerial direction with the Chair of the Public Accounts Committee. Since most ministerial directions are regarded by those involved as non-contentious, this step normally ends the matter. The Committee itself does not normally investigate the issue. When a ministerial direction is contentious, the Public Accounts Committee satisfies itself that a direction has indeed been issued. It does not investigate further. Ministerial decisions are not the subject of investigation by the Committee. Its concerns lie with the Accounting Officers. Ministers do not appear as witnesses before the British Public Accounts Committee. Their accountability is on the floor of the House or in the parliamentary committees that deal with government policies.

1.2.2 Preservation of Confidentiality

Ministerial directions are subject to access under the *Code of Access to Government Information* and the *Freedom of Information Act*. The information to be made available differs between overrulings on issues of regularity and propriety and issues of value for money. For the more straightforward matters of regularity and propriety, the advice given to the Minister by the Accounting Officer is passed on to the Treasury and the Comptroller and Auditor General; for ministerial directions in the greyer area of value for money it is not, unless the Minister authorizes the Accounting Officer to do so.[17]

Anyone hoping to discover political dirt and to uncover the nitty-gritty of the disagreements between Minister and Accounting Officer leading up to an overruling will be sadly disappointed by the publicly released documentation on ministerial directions. Normally the correspondence will be brief, with the Accounting Officer expressing his or her objections and stating the reason as regularity and propriety or value for money. The Minister responds and directs the Accounting Officer to proceed, perhaps giving a reason such as the national interest, as happened in the Hawk aircraft purchase (see Appendix A).

The confidential nature of discussions between Minister and Accounting Officer is not violated when the Public Accounts Committee investigates a ministerial overruling on value-for-money issues. The Treasury cautions:

> The Accounting Officer should . . . avoid disclosure of the terms of the advice given to the Minister, or dissociation from the Ministerial decision. Subject, where appropriate, to the Minister's agreement, the Accounting Officer should be ready to explain the reasons for such a decision and may be called on to satisfy the Committee that all relevant financial considerations were brought to the Minister's attention, before the decision was taken. It will then be for the Committee to pursue the matter further with the Minister if they so wish.[18]

The Hawk fighter episode (Appendix A) shows how this system works in practice: the Public Accounts Committee questioned the Accounting Officer, but not the Minister. The Accounting Officer told the Committee that he objected on value-for-money grounds, that he had been overruled by the Minister and would now, to the best of his abilities, implement the ministerial decision, but "the detail of [his] advice to the Secretary of State has to remain confidential. It is now a matter for the Secretary of State."

The purpose of the process of ministerial directions and its attendant correspondence is not to explain in any detail the reasons behind either the objection or the ministerial direction. It simply puts on record that the overruling has occurred, and hence the Minister, not the Accounting Officer, bears responsibility and is accountable for the decision. The Comptroller and Auditor General will make it clear in the report to the Public Accounts Committee that the Accounting Officer was overruled by the Minister. The Committee does not hold the Accounting Officer accountable. Despite the Committee's power to call Ministers as witnesses if it so wishes, it does not do so.

1.2.3 Frequency and Nature of Ministerial Directions

British ministerial directions are infrequent. In the 25 years from 1981 to 2005, there were only 37, an average of fewer than 1.5 per year. Ten related to regularity and propriety, and 17 to economy, efficiency, effectiveness and value for money. The reasons for the remaining seven were not given, but at least one, the Ministry of Defence purchase of Hawk fighter aircraft (Appendix A), was over value for money.

Not all ministerial directions are the result of a dispute between Accounting Officer and Minister. Sometimes they resolve a difficult situation to both the Minister's and the Accounting Officer's satisfaction. For example, a number of Benefits Agency directions in 1998/99 were of a technical nature rather than a disagreement on policy. The agency discovered that, owing to misinterpretation of a statutory instrument, it had been making payments for certain benefits without legal authority. It concluded that it had to recover the overpayments. The Minister in charge of the agency issued a written instruction to the Accounting Officer not to institute recovery action while the Government reached a view on a long-term solution. The instruction was time limited and had to be renewed twice. In the end, the Government introduced a new statutory instrument that regularized the payments. The Treasury was closely involved in these discussions.[19]

1.3

The Role of the British Treasury

The British Parliament "has traditionally regarded the Treasury as an ally in controlling expenditure."[20] This view is not wishful thinking. For more than a century the Public Accounts Committee, the Treasury, and the Comptroller and Auditor General have engaged in a dialogue over the role, responsibilities and accountability of Accounting Officers in ensuring good financial administration. The end result is the present system in which Accounting Officers play the central role as the responsible and accountable permanent officials. The Treasury faces two ways: in one direction it looks outwards towards Parliament and the Public Accounts Committee; in the other it looks inward towards the administrative structure and the Accounting Officers.

The Treasury official who manages relationships with Accounting Officers and the Public Accounts Committee is the Treasury Officer of Accounts. This Officer attends the Committee's meetings, and questions may be directed his or her way by members.[31] The Officer of Accounts is also involved in preparing the Treasury Minutes, which embody the Government's response to recommendations of the Public Accounts Committee. The department or agency concerned first drafts these minutes "in consultation with the relevant Treasury expenditure team. However, the text requires the approval of the Financial Secretary, the Prime Minister's Office and the Whips Office before publication as a Treasury Minute. These processes are organized by the Treasury Officer of Accounts team."[32] When the wording of a Treasury Minute is approved, the department will brief the Prime Minister's Office before the minute is tabled in the House.

The Treasury Officer of Accounts will meet with Accounting Officers before their meeting with the Public Accounts Committee and discuss the issues that will be raised there. The Officer will help new Accounting Officers prepare for their first encounter with the Committee and will direct them to a government agency that specializes in preparing officials for this sort of encounter.

The Treasury Officer of Accounts prepares materials to aid and instruct Accounting Officers in their work. Included in this information are such documents as the Treasury's *Guide to the Scrutiny of Public Expenditure* and *Regularity and Propriety: A Handbook*, which has been quoted from and has formed an invaluable source for this study. The Treasury Officer of Accounts produces "Dear Accounting Officer" letters, which inform and instruct Accounting Officers in various aspects of their responsibilities and conduct before the Public Accounts Committee. These letters have discussed such topics as fraud in government, reform of supply estimates and appropriations procedures, money laundering, financial reporting standards, the need for accuracy in evidence provided to the British Public Accounts Committee, the responsibilities of Accounting Officers before the Committee, and the need for accuracy in testimony before the Committee.

The Treasury Officer of Accounts team also keeps the Prime Minister's Office informed of all National Audit Office reports, Public Accounts Committee business and Treasury Minutes. The team provides a briefing on every National Audit Office value for money report, and this briefing sets out the focus of the report and its main findings.

1.4

The British Public Accounts Committee

In his monumental book on the modern British civil service, Peter Hennessy described the Public Accounts Committee as the "queen of the select committees." Since Gladstone's time, by its very existence, the Committee has

> exerted a cleansing effect on all departments. The knowledge that, on its day, the PAC could put the most seasoned permanent secretary, in his role as departmental accounting officer, through the wringer over some aspect of procurement, expenditure, and, increasingly, value-for-money, inspired a high degree of preparation at the highest level in a ministry prior to a PAC appearance even if, in the event,

> the committee concentrated on minnow-matters instead of sharks and whales. Whitehall reputations could be made or broken in the PAC. They still can.[21]

This situation has not changed. The Public Accounts Committee is the most prestigious of the committees of the British House of Commons, and one on which it is very desirable and an honour to serve. It has earned this prestige through its accomplishments during its more than 125 years of existence. The Committee is the forum in which Accounting Officers are called to account. About 90% of its recommendations are accepted by the Government, and they help to formulate financial administration policies and processes. The Committee is the central focus of accountability processes in the British Government.

The Treasury's *Guide to the Scrutiny of Public Expenditure* offers advice to Accounting Officers on how to prepare for and give testimony before the Public Accounts Committee: "Give a considered and direct answer to the question put to you, don't try to fudge it or prolong the answer as each member is given a limited time for questioning. Do not try to pass questions put to you to your colleagues unless they have the specific expertise and knowledge to answer them." A cautionary note quotes one chair's remarks to a witness at the close of a session of the Committee:

> I have to say, you have been, in the last three hours, a master of obfuscation and there is no point in having a parliamentary inquiry if we are subjected to platitudes. It is only in the last couple of questions in that line of questioning that you actually told us something of interest as opposed to expressing general expressions of apple-pie and motherhood. . . . That is my opinion.

Being admonished in this way by the chair of the Public Accounts Committee would be a serious blot on the record of an Accounting Officer.

The Accounting Officers are the primary and almost exclusive witnesses before the Committee. The *Guide* states:

> An Accounting Officer will be expected to furnish the Committee with explanations of concerns and issues that have been brought to the Committee's attention through C&AG reports. An Accounting Officer will have delegated authority widely, but cannot disclaim responsibility. Nor, by convention, does the incumbent Accounting Officer decline to answer questions where the events took place before taking up appointment; although the Committee may be expected not to press the incumbent's personal responsibility in such circumstances. (Section 4.2)
>
> The Committee occasionally invites former Accounting Officers to appear in tandem with the serving Accounting Officer as a witness, where the Committee believes that the former Accounting Officer is better placed to provide a first hand account of events than others or where the Accounting Officer has moved on shortly before the hearing. The purpose in recalling former Accounting Officers is to clarify matters and not to apportion blame. (Section 4.3)

Occasionally, as well, the Committee will invite other witnesses to appear, such as representatives from a business firm with which the government has had dealings. Ministers do not generally appear as witnesses before the Committee.

The Committee has 16 members, chosen to reflect the parties' voting strength in the House. Traditionally the Chair is from the largest opposition party and, frequently, will have served as a Minister in a previous government. The Committee does not divide along party lines. At Committee meetings:

> [m]embers sit around a horseshoe table, with the Chairman at the centre, the Comptroller & Auditor General and the Treasury Officer of Accounts at the either end of the table. The witnesses sit at a straight table at the end of the horseshoe; their assistants may sit immediately behind. The other seats behind are for the public. (Section 3.17)
>
> Each Committee member is given 10 minutes to ask questions and a further 5 minutes of follow up questions, once the first round of questions is completed. The length of the hearing depends on the number of members present. The Chair opens and closes the rounds of questions. (Section 3.18)

The National Audit Office provides suggested lines of questioning to the Committee and briefs the Chair before meetings. The National Audit Office is also involved in the preparation of Committee reports. Both the Treasury Officer of Accounts and the Comptroller and Auditor General may be called upon by the Committee to answer questions during Committee investigations, but not as witnesses so much as officials supporting the Committee in its investigation.

The Comptroller and Auditor General and staff (the National Audit Office) produce about 60 reports a year. Most of them are on value-for-money issues. The Public Accounts Committee usually devotes one meeting to each report. The Committee meets on Monday and Wednesday afternoons when the House is sitting—from November to July. However, in recent years it has found it desirable to meet more often and has taken to meeting in September and October as well. The National Audit Office aims to ensure that its reports are published about three weeks before the Committee meets on an issue so that Committee members, Accounting Officers and other have at least two weekends to prepare and brief themselves for meetings.

Three factors, apart from its long history and tradition as a powerful committee, permit the British Public Accounts Committee to maintain its importance. First, it is composed of able and long-serving members. It is a matter of great prestige to be appointed to the Committee, and members have to wait for an opening before they are considered for appointment. Once appointed, they remain on the Committee for a long time.

Second, the Public Accounts Committee adopts a non-party attitude in its work and seeks to reach dispassionate findings and recommendations whatever government is in power. The Committee performs a vital function on behalf of Parliament. It gives Parliament, and through Parliament the people of Britain, assurance that the Government handles its finances with regularity and propriety, and, as far as possible, ensures that expenditures are made with due regard to economy, effectiveness and value for money. The Committee's sense of this vital function in the broader scheme of parliamentary government creates a demand that its members act in this non-partisan way.

Third, the British Public Accounts Committee operates within a system of clearly and logically related bodies and functions. Its focus on the Accounting Officers as the officials personally responsible for good financial administration provides a logic and coherence to the system. The Committee has a well-established place within an effectively operating system of roles, responsibilities and accountabilities.

Deviations from the principles of regularity and propriety in financial administration can provide scandals and outrage for Parliament and the media in Britain. However, these transgressions have in recent years normally been reserved for the actions of heads of executive agencies who have been brought into the civil service from the world of business, where the standards of regularity and propriety are viewed somewhat differently. These scandals have been relatively minor and have not caused governments to tremble. The Public Accounts Committee has investigated them. Where there are more important disputes, such as the Hawk fighter aircraft or Pergau Dam affairs (See Appendices A and

B), the responsibility has clearly belonged to the Ministers, not the Accounting Officers. Nor has accountability been before the Public Accounts Committee.

2 Britain and Canada Compared

On the surface, the Canadian and British systems for financial audit and accountability to Parliament are similar. Both countries have Parliamentary-Cabinet systems of government. Both are structured on the basis of departments, with Ministers as their political heads, while under them the public (civil) service is headed by Deputy Ministers (Permanent Secretaries). Both have independent legislative auditors who examine the accounts and transactions of the government and report to Parliament. Both have a central agency—Treasury Board and Treasury—with responsibilities for ensuring good financial management. Both have Public Accounts Committees with the task of reviewing the reports of the legislative auditors and the Government's performance on behalf of Parliament. But this superficial similarity masks profound differences in the ways in which the two systems are structured and operate in actual practice.

2.1

Permanent Secretaries and Deputy Ministers

British Permanent Secretaries hold positions like those of Canadian Deputy Ministers in most respects, but their position as Accounting Officers has no Canadian counterpart. This difference exists despite the fact that, as a recent Canadian Government document points out, "the responsibilities of [British] accounting officers are very similar to those of a deputy minister under the *Financial Administration Act* and Treasury Board policies."[11] Both are responsible for financial regularity and probity; for economy, efficiency and effectiveness; and for financial and management systems for departmental programs and public property.

This similarity in responsibilities belies a striking difference in statutory authority. The Canadian *Financial Administration Act* assigns broad statutory powers to Deputy Ministers in both financial and personnel administration. Deputy Ministers have additional statutory responsibilities under other statutes, including the *Public Service Employment Act* and the *Official Languages Act*. Deputy Ministers hold these statutory powers in their own right. The Minister does not hold these powers, nor are they delegated to Deputy Ministers by the Minister.

In comparison, the position of Accounting Officer in Britain first received mention in the 2002 *Government Resources and Accounts Act*. Their statutory powers are much less than those of Deputy Ministers. The duties of Accounting Officers have been established through the work of the Treasury and the Public Accounts Committee, and they have been defined in Treasury documents.

As the civil service heads of departments, British Permanent Secretaries are accountable to their Ministers for good management of departments. For the standards they are expected, as Accounting Officers, to meet by the Treasury and the Public Accounts Committee—regularity, propriety and value for money—their formal accountability is before the Public Accounts Committee. In stark contrast, the Canadian Government insists that the accountability of Deputy Ministers is entirely internal, within the government, to their Ministers and the Prime Minister:

> Deputy ministers are accountable to their ministers (and ultimately, through the Clerk of the Privy Council, to the Prime Minister) for the discharge of their responsibilities, as outlined in legislation or in management policies approved by the Treasury Board. *Even when senior officials support the accountability of ministers by providing information publicly, such as when appearing before parliamentary committees, they do so on behalf of their ministers.*[15]

This insistence by the Canadian Government that Deputy Ministers have no accountability relationship with the Public Accounts Committee, and that they appear before it on behalf of their Ministers, is the single most important difference between them and British Permanent Secretaries.

In Britain, the responsibilities of Accounting Officers towards Parliament are a recognized exception to the rule that Ministers should be both answerable and accountable to Parliament and the public. With their personal responsibility and accountability in a parliamentary forum, Accounting Officers have a duty to stand up to Ministers—and they do. The responsibilities that Accounting Officers hold in their own right give the civil service a sphere of responsibility and activity separate from that of Ministers.

Canadian Deputy Ministers have different career patterns from their British counterparts. These differences contribute to the identity of a Deputy Minister community whose members are "in a sense, the Prime Minister's public servant 'agents' in the various departments of government."[6] This sense is reinforced by the Canadian doctrine of deputy ministerial accountability to the Prime Minister. Though the British Permanent Secretaries also form a community, their different career patterns, the requirements of their position as Accounting Officers for departments, and the absence of an official doctrine of accountability and loyalty to the Prime Minister root them more firmly in their departments and make them less of a community.

The British Accounting Officer system demands a loyalty by Accounting Officers to rules and regulations, through the requirement that Accounting Officers account for their personal responsibilities before the Public Accounts Committee. This obligation contributes to an emphasis on probity in financial management in departments. Canadian Deputy Ministers, like their British counterparts, have multiple loyalties and accountabilities, but official Canadian doctrine, unlike the British, places no emphasis on their external loyalty or accountability to Parliament. Indeed, Canadian doctrine denies that such a deputy ministerial accountability exists.

The career patterns of British Permanent Secretaries and Canadian Deputy Ministers differ substantially. In comparison with their British counterparts, Canadian Deputy Ministers have less experience in government, are first appointed at a younger age, have less experience in their department, and as a norm serve as Deputy Minister in two and frequently more departments. Canadian Deputy Ministers also usually retire earlier than their British counterparts. British Permanent Secretaries remain in their department for a period of at least three to five years, and frequently more.

2.2

Regularity, Propriety and Value for Money

Canada has many rules and regulations intended to govern the actions of those responsible for financial administration, but it has not proceeded as far as Britain in codifying the basic principles into straightforward rules of behaviour. The British definitions of regularity and propriety are models of clarity. They provide clear and simple guidelines and standards to Accounting Officers and others involved in financial administration. Canadian rules and regulations lack this simplicity and clarity.

In neither Britain nor Canada does the Auditor General comment on the merits or demerits of a particular program or policy. In both countries the value-for-money audit is directed to the question of whether the administration of policies meets the standards of economy and efficiency. Britain includes effectiveness in its value-for-money audit; Canada does not. To reflect the limitations of these audits, the Canadian Auditor General refers to them as "performance audits" rather than as audits of value for money.

2.3

Ministerial Directions (Overrulings)

There is no Canadian equivalent to the British practice of ministerial directions. The Canadian government offers, instead, an avenue of discussion with the Clerk of the Privy Council, if a disagreement affecting the operations of a department cannot be resolved between Minister and Deputy.[17]

Though the British Government also offers a similar avenue of discussion with the Head of the Civil Service (Secretary to the Cabinet) when Permanent Secretaries have a problem with their Ministers, there is no indication that consultation of Accounting Officer with the Head normally precedes a ministerial direction. Tim Lankester did not consult with the Head of the British Civil Service before registering his objection to the Pergau Dam project. He considered the issue to be cut and dried. Grants under the program were intended to improve the economic well-being of the recipient country. Studies had shown that the Pergau Dam project would not improve economic well-being and, therefore, it ran counter to the standards he had a duty to uphold. The responsibility for making the decision belonged to him as the Accounting Officer, not to the Head of the Civil Service (see Appendix B).

In both Britain and Canada, the rules regarding the appearance of civil/public servants before parliamentary committees precludes them from disclosing confidential information and the advice given to Ministers. In Britain these same rules of confidentiality govern the content of documents related to ministerial directions, which are available to Parliament and the public.

2.4

Treasury and Treasury Board

The British Treasury is regarded by Parliament as its ally in controlling expenditure. The Canadian Treasury Board is not so regarded by the

Canadian Parliament. There is no Canadian counterpart to the British Treasury's documents describing the responsibilities and duties of Accounting Officers, the processes for the scrutiny of government expenditures or the standards (such as regularity, propriety and value for money) that guide the British system. In contrast to its British counterpart, the Canadian Treasury Board is not concerned with its accountability to Parliament.

2.5

The Role of the Auditor General

Both Auditor Generals conduct an audit that examines compliance with rules and statutes. Both produce reports that form the starting point for the investigations of the respective Public Accounts Committees. However, their role in relation to the work of the two Committees differs: the Canadian Auditor General, unlike the British, does not sit at the table with the Public Accounts Committee during its hearings. Nor does the Auditor General suggest lines of questioning to members or draft reports for the Committee. These two tasks are performed in Canada by staff from the research branch of the Library of Parliament.

In Canada, the task of reporting back to the Public Accounts Committee on action or inaction on its recommendations rests with the Auditor General. The British assign this task to the Treasury.

2.6

The Public Accounts Committees

The Canadian Public Accounts Committee does not have the same understanding of shared objectives and concerns over regularity and propriety with the Canadian Treasury Board that its British counterpart has with the British Treasury. Nor does it have the clear focus on officials who unequivocally are personally responsible and accountable that the

British Committee has in the Accounting Officers. It does not share the British tradition of over 100 years of successful and prestigious work. Membership in the Canadian Public Accounts Committee, like membership in other parliamentary committees, often changes at the whim of party leadership. Members serve on the Committee for a much briefer time and tend to be more transient than those on its British counterpart.

The Canadian Public Accounts Committee has sometimes been highly partisan in its investigations, as it was in the spring of 2004 in its investigation into the Sponsorship affair, with the Opposition attacking both Ministers and public servants, while the Government, in response, protected and defended its Ministers and public servants. The Committee's partisan zeal in hunting scandals is in proportion to the Opposition's perception of ministerial involvement in the issues under investigation.

Combined, these factors leave the Canadian Public Accounts Committee, in comparison with the British, in a relatively weak position, unclear about who is responsible for financial regularity and propriety in departments, and faced with a Treasury Board that does not view itself as sharing a common interest in good financial administration. Moreover, there would appear to be no tradition of improving the system, to enable it to get beyond hunting for scandals and finding persons to blame and to begin tackling more fundamental and important problems of governance and accountability.

2.7

Conclusions: Similar Outside, Different Inside

Perhaps it is surprising that two systems that have so many similarities on the outside should be so different in their internal workings, and particularly in their processes and structures for accountability to Parliament for financial administration. These differences have three sources.

First, Canada has a tradition of government use of funds for patronage—

for local or other purposes that involve political decisions on how specific expenditures will be made. This tradition is by no means extinct, as the Sponsorship affair shows.[78] If the issues that concern Parliament and the Public Accounts Committee are the actions of politicians and Ministers, then it follows that Parliament and its committees will treat these issues as political and partisan, and not about ensuring regularity and propriety in the public service.

Second, the Government's insistence that Dep[illegible] Ministers before the Public Accounts Committee speak solely on behalf of their Ministers, and not as the holders of responsibilities in their own right, skews the investigations of the Committee towards ministerial and partisan issues. This partisanship leads the Committee away from ensuring that the public service remains a politically neutral instrument which has a responsibility to uphold the law, to act impartially in a non-partisan manner, and to act in such a way that it is capable of serving successive governments of different political stripes with equal effectiveness and trust.

The Canadian public service has a much stronger statutory and formal institutional identity than the British. That is true for Canadian Deputy Ministers in comparison with British Permanent Secretaries. It is also true for the Canadian public service as a whole. There is no *Civil Service Act* in Britain, nothing comparable to the Canadian *Public Service Employment Act* and the Public Service Commission, an agent of Parliament, whose role is to affirm and safeguard the principles of merit and neutrality in the public service. The authority for managing the British Civil Service is found in Orders in Council based on royal prerogative, without the support of statutory authority. A parliamentary committee has recommended that there be a *Civil Service Act* in Britain, but such an Act has not yet been introduced in Parliament.

Yet, through the Accounting Officers, Britain has managed to create a system that recognizes and defines the limits to Ministers' powers to direct the public service when a basic principle of proper administration is at stake. Barberis considers Lankester's objection to the Pergau Dam project to have been crucial in establishing a limit to the Government's view that the public service has no identity or independence and exists to do what ministers tell it to do:

> Tim Lankester's note of dissent over the Pergau Dam project is one of the best known among recent exercises of prerogative. He did not stop the project. But he laid down a marker which was instrumental in the subsequent rescheduling of British financial support. More than this, he re-established in some measure both his own independence and that of the office of permanent secretary.[29]

If such boundaries have been established in Canada, they were not apparent in the Sponsorship affair or in any of the other scandals that have harmed Canadians' trust in the public service in recent years.

Third, the Prime Minister and the Privy Council Office play a much stronger role in the lives and perceptions of Canadian Deputy Ministers than the British system demands of Permanent Secretaries. There is no British counterpart to the Canadian doctrine of deputy ministerial accountability to the Prime Minister. The concerns of Deputy Ministers in Canada revolve more around the concerns of the centre, and less around their responsibilities as managers of departments. The Glassco Commission in the early 1960s espoused the view, at a time when both human resources and financial administration were dominated by central agencies, that Canadian deputy ministers should be allowed to manage their departments. Its theme was "Let the Managers Manage!" The Lambert Commission, two decades later, when much of the responsibility for management had been delegated to Deputy Ministers, found a different problem. Its theme was "Make the Managers Manage!" The government did not accept the Lambert Commission's recommendation that Canada adopt the Accounting Officer approach. The British Accounting Officer system forces the managers to manage; the Canadian system does not.

The British system is coherent, in the sense that the key players—Accounting Officers, Public Accounts Committee, Treasury, and Comptroller and Auditor General—have clearly defined and mutually supportive and complementary roles and responsibilities. The Canadian approach to accountability lacks this coherence, clarity and effectiveness.

3 The Arguments Against the Accounting Officer System

In 1979, the Lambert Commission on financial management and accountability proposed that Canadian Deputy Ministers "be liable to be called to account directly for their assigned and delegated responsibilities before the parliamentary committee most directly concerned with administrative performance, the Public Accounts Committee."[40] The Government did not accept this recommendation. In 1985, the McGrath Committee on reform of the House of Commons supported the same reform. In 2003, Prime Minister Jean Chrétien expressed himself in favour of the Accounting Officer approach, but nothing came of it. In May 2005, the Public Accounts Committee recommended that "deputy ministers be designated as accounting officers with responsibilities similar to those held by accounting officers in the United Kingdom."[41] The Government rejected this proposal.

A mixed bag of arguments has been offered by the Government for its rejections. Some are based on misunderstandings of the British system; some on differences between the way the Canadian and British Parliamentary-Cabinet systems of government work. Others derive from the Government's interpretation of the constitutional principle of ministerial responsibility. This review of the various arguments against the Accounting Officer system is followed by three questions: Which of the arguments have validity? Can the objections identified in the valid arguments be resolved? Do the principles underlying the Accounting Officer system offer guidelines for reform in Canada?

3.1

Misunderstandings of the British System

Many of the Canadian Government's objections to the Accounting Officer system are based on misunderstandings. These long-standing misunderstandings include the contentions, first, that it would make Deputy Ministers accountable to the Public Accounts Committee, and that would allow the Committee to reward, punish and instruct public servants; second, that it would violate the principle of ministerial responsibility; and third, that it would violate the confidentiality of discussions between Ministers and Deputy Ministers.

If these objections derived from an accurate portrayal of the British Accounting Officer system, they would be powerful grounds for rejecting it. But they reveal a profound misunderstanding of the British system. Indeed, it is difficult to understand how Parliamentary-Cabinet government could have survived in Britain if it had such a dysfunctional set of relationships between Parliament, Ministers and civil servants. Though based on misunderstandings, these arguments have had a life of their own and continue to be uttered by defenders of the status quo.

Like all other parliamentary committees, the British Public Accounts Committee does not reward, punish or instruct Accounting Officers or other civil servants. British Accounting Officers give evidence as witnesses before the Public Accounts Committee. This process can be formidable—one new Accounting Officer recently described the experience as "frightening"—but it is a matter of rendering an account for responsibilities held and exercised, not of being rewarded, punished or instructed on courses of action by the Committee. There is no reason to expect that the Canadian Public Accounts Committee would have these powers. No parliamentary committee, in Britain or in Canada, now has them, nor is giving them to a parliamentary committee consistent with the constitutional principles of parliamentary government.

The origins of the claim that the Accounting Officer system gives parliamentary committees the power to reward, punish and instruct public servants lie in the Privy Council Office's 1977 submission to the Lambert Commission.[42] It reappeared 12 years later when Gordon Osbaldeston, a former Clerk of the Canadian Privy Council, rejected the Accounting Officer approach because it would create a "parallel accountability of deputy ministers to parliamentary committees."[43] He mistakenly stated that the Lambert Commission had recommended this system.[44] Arthur Kroeger, a respected former Deputy Minister, offered the same argument in objecting to the Accounting Officer approach in his testimony before the Canadian Public Accounts Committee in February 2005: "I don't think that many people seriously suggest that parliamentary committees could give directions to officials, but that has been suggested by the Lambert Commission and by some auditors general in the past."[45]

The argument that the Accounting Officer system violates the principle of ministerial responsibility was invoked by the Privy Council Office in *Responsibility in the Constitution*.[46] It was also invoked by Kroeger, when he told the Public Accounts Committee: "[I]f you say that officials should be accountable to parliamentary committees, you have a conflict. Is the minister the boss, or is the parliamentary committee?"[47] There might be a conflict between the responsibilities and accountabilities of Accounting Officers and the principle of ministerial responsibility if British Accounting Officers were accountable to the Public Accounts Committee, in the sense of being subject to punishment, rewards and instruction from the Committee. However, the British Public Accounts Committee does not have these powers, and Accounting Officers' responsibilities and accountabilities do not conflict with those of Ministers.

British Ministers can and do overrule Accounting Officers through ministerial directions. The Accounting Officer's duty is to offer the best advice he or she can. If the Minister does not accept this advice and issues a ministerial direction, the Accounting Officer's duty is to implement the decision. This power of the Minister to overrule an Accounting Officer ensures that the principle of ministerial responsibility is maintained. Any reforms made in Canada must ensure that the same power to make the final decision when there is a disagreement over a course of action resides in the hands of Ministers, not public servants.

The Canadian Government has expressed concern that the process of making public the documents related to ministerial directions would undermine the relationship between Minister and Deputy:

> Systematically formalizing and potentially making public any disagreement on administrative or operational matters runs the risk of significantly undermining the working relationship between ministers and deputy ministers that is essential to the effective operation of government departments.[18]

It does not lead to this result in Britain, and it is difficult to see how fewer than one and a half ministerial directions per year could do so. The rules regarding the confidentiality of advice given by public servants to Ministers cover the preliminary discussions between Minister and Accounting Officer which precede a ministerial direction. They would do so in Canada as well.

Surely Canadian Deputy Ministers are not as feckless and inconsiderate of their Ministers' well-being as the *Ottawa Citizen* found Arthur Kroeger to believe:

> Mr. Kroeger, who strongly opposes the British model, argues that it could "do more harm than good," especially if deputy ministers started routinely demanding written instructions from ministers, which would amount to "second-guessing" politicians in the media.[19]

It would be up to Canadian Ministers and their Deputies to find ways of avoiding a ministerial overruling. Their British peers generally manage to do so.

3.2

Parliament Does not Want to Make the Distinction Between the Responsibilities and Accountabilities of Ministers and Deputy Ministers that the Accounting Officer System Requires

The claim that Parliament does not want to make a distinction between the responsibilities and accountabilities of Ministers and Deputy Ministers was offered by the Government in its 1977 *Responsibility in the Constitution*.[40] This claim is not borne out by the evidence.

The Canadian Parliament has addressed the question of making a division between the responsibility and accountability before parliamentary committees on two occasions, first in the *Report of the Special Committee on Reform of the House of Commons* in 1985,[41] and second in the Public Accounts Committee's 10th report of May 2005.[42] Both Committees supported recognition of a division between the answerability of officials and of Ministers.

The Government's claim also raises the question of whether the Government itself does not want to make a distinction between the responsibilities of Ministers and public servants. Historical evidence suggests that Canadian Governments have not wanted to make this distinction. Much of the activity of government since Confederation has involved the Government's use of resources for partisan and other doubtful purposes. Patronage used to be an accepted practice.[43] The Sponsorship affair is only a recent example of this long-standing government practice of blurring the lines of responsibility between Ministers and public servants. Many previous abuses also became political scandals. Administration was highly partisan and political. So was the way Parliament treated administration. That does not mean that Parliament still wants to treat administration as partisan and political or that the Government is justified in continuing to employ the questionable practices of the past. The Public Accounts Committee has expressed its desire for change.

3.3

The Canadian Parliament and Public Accounts Committee Are Too Partisan to Permit the System to Succeed

The contention that the Canadian Public Accounts Committee has not usually acted in a non-partisan way over the years is correct. In fact, for much of Canada's history, the Committee did not act at all. It was inert. It did not meet. Ministerial control over contracts, grants, appointments and other aspects of administration were the instruments through which Governments won and rewarded supporters. The Government did not want a parliamentary committee to look too closely at its use of funds. The Committee sometimes roused itself when there was a change of government, and it could attack the excesses and improprieties of the previous administration. But, most of the time, with the Government having a majority on the Committee, and the Chair from the Government side as well, the Committee was passive. Only after Prime Minister Diefenbaker in 1958 for the first time appointed an Opposition member as chair did the Canadian Public Accounts Committee begin to become a consistently functioning part of the parliamentary scene.

Regardless of its faults, the Canadian Public Accounts Committee is neither a failure nor doomed to incessant partisan bickering. The Committee can work as a cooperative body in which members from all parties agree on important issues, as was proven by its unanimous May 2005 report on ministerial and deputy ministerial accountability. That the Committee managed to produce this important and unanimous non-partisan report after its highly partisan inquiry into the Sponsorship issue is no mean achievement.

The Canadian Public Accounts Committee normally acts in this non-partisan way when it is not examining questionable acts in which Ministers were involved. Partisanship in the Committee is attenuated when the issues it examines, unlike the Sponsorship affair, have nothing to do with decisions and actions taken by Ministers or on direct instructions from Ministers. Clear distinctions between the responsibility and accountability of Ministers, and those of the public servants who are the witnesses before the Committee, will reduce partisanship in the Committee.

The members of the Public Accounts Committee are politicians and members of political parties. An Opposition member should chair the Public Accounts Committee, as the British recognized over a century ago, because he or she will be motivated to make thorough and tough inquiries into the Government's activities. The Government retains a majority (or plurality in a minority Parliament) of members on the Committee, so they can act as a moderating influence on the Chair and ensure that the Committee is fair and balanced in its work. That financial administration in Britain is a non-partisan matter, and that the British Public Accounts Committee acts in a non-partisan way, shows that the Committee's work over the years has succeeded in taking the party elements out of its role in overseeing financial administration, not that its members are non-partisan.

The issue of ministerial answerability in Question Period is a different matter. The Canadian Question Period is an intensely partisan parliamentary event, and also the most reported upon of Parliament's activities. Its partisan nature is not going to change. The Government cannot prevent Opposition members from asking questions that, if the Accounting Officer system were adopted, would be the responsibility of Deputy Ministers, not Ministers.

But the Government can change the way it answers parliamentary questions. Any answer by a Minister to a question in Parliament is acceptable, as long as it is relevant to the question and couched in parliamentary language. A Minister could answer: "The question raised by the honourable member relates to the responsibilities of the departmental Deputy Minister. The appropriate venue for raising it is the Public Accounts Committee." Or the Minister could answer the first question on an issue in this way, and then not answer subsequent questions. No answer at all meets the requirements of being relevant and in parliamentary language. This tactic has been used by Ministers as a response to parliamentary questions.[11]

Ministers at present answer questions, without causing problems, about Crown corporations and other non-departmental agencies that possess statutory powers in their own right. A similar approach to the answerability of Ministers in Question Period for the exercise of the statutory responsibilities of Deputy Ministers could be worked out.

3.4

Parliament Has No Authority to Oversee the Government's Compliance with Laws

The audit and review of "regularity" by both the Comptroller and Auditor General and the Public Accounts Committee in Britain are, in the Treasury's words, about "compliance with appropriate authorities." These authorities include statutes, Treasury regulations, and principles and standards established through the work of the Public Accounts Committee. The Comptroller and Auditor General's audit of compliance forms the basis and starting point for the audit process. Without assurance of compliance to laws, rules and regulations, there is no assurance that the Government's use of funds meets even the basic standards for parliamentary control of the public purse, let alone the more demanding standards of propriety and value for money.

The Canadian Auditor General's audit of the Sponsorship issue was a compliance audit into the regularity of expenditures. Its main finding was that the administration of the Sponsorship initiative had not conformed with statutory and other rules—had broken "every rule in the book." Even the Canadian Auditor General's performance audits include a compliance audit.

As in Britain, the audit reports of the Canadian Auditor General form the starting point for investigations by the Public Accounts Committee. Government accountability to Parliament for financial management begins with a compliance audit by the Auditor General. Much of what the Canadian Public Accounts Committee does is a matter of overseeing compliance with statutes, rules and regulations by government.

The Canadian Government appears to question this role. In its *Final Submissions* to the Gomery Commission, the Government made this extraordinary claim:

> Parliament creates many statutory obligations—under the *Income Tax Act*, for example—but this does not give Parliament the authority to oversee compliance or to enforce the law. That is a function of the executive.[11]

That Parliament does not have a role in the executive function of the day-to-day administrative activities involved in overseeing and enforcing the law is not in dispute. But to claim that Parliament does not have the authority to oversee the Government's compliance with statutes, or to ensure that statutes are complied with, contradicts the basic constitutional principle that Parliament has the right to assure itself that the Government has complied with Parliament's intentions as expressed in laws.

The Government's claim that Parliament has no authority to oversee compliance to the law defies constitutional principles, the statute governing the role of the Auditor General, the practices of Public Accounts Committees in both Canada and Britain, and principles established through many centuries of evolution of parliamentary control of the public purse. The fact that the Government not only made the statement in its formal submission to the Gomery Commission, but then repeated it in its response to a report of the Public Accounts Committee, suggests that it actually believes this erroneous and disturbing assertion.

The Government's example of the *Income Tax Act* is a red herring. The *Income Tax Act* is the most detailed and voluminous Act passed by the Canadian Parliament. It is detailed and voluminous because every clause, word and comma in the Act has been or will be subject to scrutiny in the courts. Jurisprudence over the *Income Tax Act* has been extensive and rigorous. The *Income Tax Act* is about the terms and conditions under which the Government takes money out of taxpayers' pockets, and those taxpayers with enough money to afford it can, and do, hire the best and brightest lawyers to take the Government to court when they do not agree with its interpretations of the *Income Tax Act*.

There has been no comparable jurisprudence on the responsibilities and accountabilities of Deputy Ministers, as set out in the *Financial Administration Act*, nor is there likely to be. Those who are concerned with the Government's abuse of the *Financial Administration Act* do not hire lawyers. The courts oversee and enforce compliance with the *Income Tax Act*; they do not do so over the allocations of powers and responsibilities under the *Financial Administration Act*. The task of assuring Parliament, and, through Parliament, the people of Canada, that the Government complies with the provisions of the *Financial Administration Act* and other statutes relating to regularity, propriety and value for money rests with the Public Accounts Committee and the Auditor General, not the courts.

3.5

Canada Already Has an Effective Way to Resolve Disagreements

The Canadian Government claims that there is no need to follow the lines of the British Accounting Officer system because Canada already has a satisfactory route of appeal for a Deputy Minister who disagrees with an instruction from a Minister. This route is to the Clerk of the Privy Council or even to the Prime Minister.[46] After that, "if the Deputy Minister does not concur with the final outcome, he or she has the option of resigning, rather than implementing the decision of the Minister."[47]

These avenues of appeal, the government argues, serve Canadian needs well. The main arguments offered in favour of the Canadian approach are as follows:

- It recognizes that both the Minister and the Deputy Minister are appointed by the Prime Minister, to whom both are accountable for the management of the Department and the implementation of the collective policies of the Government, and it allows the Prime Minister to adjudicate.
- It has the potential to avert a problem before any action is taken.
- It respects the confidential nature of advice offered by the Deputy Minister to the Minister, advice that will not become public.
- It clearly ascribes responsibility to Ministers for the final decision.[48]

The following discussion deals solely with issues relating to the Deputy Ministers' and Accounting Officers' responsibilities for powers they hold in their own right, those relating to questions of regularity, propriety and value for money within their own department. The discussion does not relate to a Deputy Minister's or a Permanent Secretary's task of advising the Minister on policy and general departmental matters.

If a British Accounting Officer wants to discuss a disagreement with the Head of the British Civil Service (Cabinet Secretary, the British equivalent of the Clerk of the Privy Council Office), then he or she may. That this route is not normally used by Permanent Secretaries in relation to their duties as Accounting Officers does not mean that it does not exist. British Ministers can and do discuss such disagreements with their ministerial colleagues, as was seen in the Hawk fighter aircraft events (Appendix A). On occasion the Accounting Officer, Minister, and Treasury discuss issues in order to reach a mutually satisfactory conclusion. There is no British equivalent to the Canadian doctrine of deputy ministerial accountability to the Prime Minister, but, if Canada wished to retain the route of appeal to the Prime Minister, there is no constitutional or other obstacle to doing so.

The British Accounting Officer system, even more than the Canadian, "has the potential to avert a problem before any action is taken." The British Treasury requires thorough preliminary discussion between Accounting Officer and Minister before an overruling through a ministerial direction. Quite possibly the British system puts an even greater premium on thorough preliminary discussion because both Minister and Accounting Officer know that their decisions must stand up to parliamentary and public scrutiny. The low number of such ministerial overrulings—an average of 1.5 per year—shows that the process has strong and successful inducements for encouraging both sides to reach a mutually satisfactory accommodation.

Nor would there be a problem in maintaining the confidentiality of Minister-Deputy Minister discussions. The purpose of the documentation that is made public on ministerial directions in Britain is to put on the record the fact that the direction has been issued, and to give the general reason for the objection and the overruling. It is not to reveal the content of confidential discussions between Minister and Accounting Officer. Similar protections exist for safeguarding the confidentiality of discussions between Minister and Deputy Minister in Canada. That would not change under an Accounting Officer system.

The difference between the British and the Canadian procedures lies in the fourth point: identifying who has responsibility when the advice of a Deputy Minister/Permanent Secretary is overruled. The Canadian approach, it is argued, "clearly ascribes responsibility to Ministers for the final decision." That it did so was not evident in the Sponsorship affair, either to the Canadian Public Accounts Committee or to Justice Gomery. The British Accounting Officer system does not allow this sort of confusion to occur. The Accounting Officer has the responsibility, unless overruled by his or her Minister through the formal process of a ministerial direction. When this happens, the Minister, not the Accounting Officer, has the responsibility and is accountable. There is no possibility of confusion.

The current Canadian practice contains more possibilities for confusion than the British: if the Clerk of the Privy Council or the Prime Minister instructs a Deputy Minister to do something, then who has the responsibility? Is it the Deputy Minister, if the instruction relates to his or her statutory or other powers? Is it the Minister? Is it the Clerk or the Prime Minister? What is the role of the Prime Minister's Office in issuing orders or recommendations that appear to have the force of the Prime Minister behind them? An informal system like the Canadian one can easily lead to confusion about who is responsible.

The current Canadian practice hides problems and violates transparency. It puts a premium on a Deputy Minister's sensitivity to the wishes of the centre, even when these might conflict with his or her departmental responsibilities. The dire threat of having to resign as the only alternative to obeying orders must surely be a strong incentive to encourage Deputy Ministers to acquiesce to ministerial orders that they believe do not meet acceptable standards. The route of a formal process for ministerial overruling offers a much less Draconian and more reasonable alternative: to disagree, to be overruled, and then to implement the ministerial direction to the best of the Accounting Officer's ability.

3.6

Contradictions and Inconsistencies in the Government's Views on Responsibility, Accountability and Answerability

Canada's Auditor General has expressed the need for a clearer definition of the respective responsibilities and accountabilities of Ministers and public servants. The Canadian Public Accounts Committee found that "ambiguities in the doctrine [of ministerial responsibility], perhaps tolerable in the past, are now contributing to a situation in which those with responsibility are able to avoid accountability, as the Sponsorship Program has so clearly and so sadly demonstrated."[49]

Despite these views to the contrary, the Government continues to maintain that there is no ambiguity and no confusion in the respective responsibilities and accountabilities of Ministers and Deputy Ministers:

> Even when senior officials support the accountability of ministers by providing information publicly, such as when appearing before parliamentary committees, they do so on behalf of their Ministers.[50]

To understand why those outside Government find ambiguity and confusion, it is necessary to begin with the Government's definitions of three central concepts:

> *Responsibility* identifies the field within which a public office holder (whether elected or unelected) can act; it is defined by the specific authority given to an office holder (by law or delegation).
>
> *Accountability* is the means of enforcing or explaining responsibility. It involves rendering an account of how responsibilities have been

> carried out and problems corrected and, depending on the circumstances, accepting personal consequences for problems the office holder caused or problems that could have been avoided or corrected if the office holder had acted appropriately.
>
> *Answerability* . . . refers to the duty to inform and explain, but does not include the potential personal consequences that are part of accountability. A Minister can be answerable for any actions taken by bodies within his or her portfolio, but cannot be held accountable—i.e., cannot be expected to suffer consequences—for powers not vested in the Minister.[51]

The difficulties arise in the attempt to reconcile the Government's views on ministerial and deputy ministerial responsibility and accountability with these definitions.

A crucial problem arises from the Government's claim that Deputy Ministers appear before parliamentary committees only to "answer" on behalf of their Ministers, not to be "accountable," even when the issue relates to the use of powers held by Deputy Ministers, not Ministers. According to the Government's definitions, Deputy Ministers cannot be "answerable" on behalf of Ministers for the exercise of these powers. These powers are not "vested in the Minister," as would be required for Deputy Ministers to appear in an "answerability" role on behalf of Ministers. For the use of these powers, Deputy Ministers must appear before a parliamentary committee as the holders of power in their own right.

Peter Aucoin and Mark Jarvis have similarly criticized the Government's loose application of the terms "responsibility," "accountability" and "answerability": "[T]hose who are confused by the use of these terms, with their various meanings, should perhaps be excused for their confusion. Those who should know better have not done everything necessary to help sort things out."[52] They propose that the attempt to distinguish the "answerability" of Deputy Ministers from the "accountability" of Ministers should be abandoned. They argue that the relationship of a Deputy Minister to the Public Accounts Committee is one of "accountability" and must be treated as such.

The Government's definitions might also lead to confusion about the relationship of a Minister to his or her department. If Ministers are accountable to Parliament for actions of public servants, then Ministers, by the government's definitions, must have the specific authority for the actions of public servants under authorities vested in the public servants directly. Perhaps the Government believes that the general responsibility of Ministers for their departments trumps the statutory and other responsibilities that Deputy Ministers possess in their own right. It does not say so.

The terms responsibility, accountability and answerability have been used in many different ways, with different shades of meaning by different persons and in different places. The Privy Council Office's 1977 *Responsibility in the Constitution* frequently uses the terms accountability and answerability interchangeably. British sources use all three terms in a much different manner from the Canadian Government. Responsibility, accountability and answerability are what philosophers describe as "essentially contestable concepts." As such, they do not have fixed, rigorous meanings but can be employed in a variety of ways that involve overlapping, complementary and even conflicting intentions and meanings. The way the terms are defined and employed depends on what use people want to make of them.

The Government's bottom line appears to be that it is not prepared to recognize, or allow Parliament to recognize, that Deputy Ministers possess statutory and other powers in their own right for which they can be held accountable before the Public Accounts Committee. Except through canards about the British system, confused and contradictory arguments, *ex cathedra* statements, and criticisms of the behaviour of the Canadian Parliament, the Government has not offered convincing reasons for this unwillingness.

3.7

Conclusions

The British Accounting Officer system does not give parliamentary committees the power to reward, punish or instruct public servants. It does not compromise the principle of ministerial responsibility. It does not lead to a plethora of disputes between Ministers and Deputy Ministers being aired in public. It does not breach the confidentiality of Minister-Deputy Minister discussions. It does not mean that the sort of informal system that operates in Canada for resolving disagreements between Ministers and Deputies cannot continue.

Three arguments remain against the adoption of the British system in Canada: one, that there is no need for it because the current Canadian system works well; two, that the Canadian Public Accounts Committee is too partisan to fulfill the role expected of it if Canada were to move towards the Accounting Officer model, as is Parliament itself; three, that it will alter the relationship between Ministers and Deputy Ministers.

This study is not the appropriate place to argue over whether the current Canadian approach works well. What has been made clear here is that there are enough ambiguities, contradictions and gaps in the current approach to the respective responsibilities and accountabilities of Ministers and public servants for financial administration to create confusion over who holds responsibility. That in itself is sufficient to justify serious consideration of other ways of allocating responsibility and other approaches to ensuring probity. The British Accounting Officer system provides a clarity and coherence in roles and responsibilities that is lacking in the Canadian approach.

Clarity and coherence are no guarantee that the system will ensure probity, but they help.

The question of partisanship in the Public Accounts Committee has already been considered, with the conclusion is that it is an overrated concern. While the Committee has indeed been partisan some of the time, as in its investigation of the Sponsorship affair, for the most part it does not operate in a partisan manner. The Committee will likely be partisan when the issues it is examining are the decisions and responsibility of Ministers. But the Committee has a good and consistent record of non-partisanship when it investigates issues that relate to the responsibilities and decisions of public servants. It was admirably non-partisan in its 2005 study of ministerial and deputy ministerial accountability.

Reforms can build on this base, and the Committee can be encouraged to avoid entering into the potentially harmful areas where partisan zeal triumphs over cross-party concern for the probity of financial administration of Canada. It should not, in so far as it can be avoided, be asked to look into issues where the decisions have been made by Ministers. The appropriate focus for investigation of ministerial decisions (or lack thereof) is on the floor of the House or in other parliamentary committees that look at policy issues.

Finally, there is no doubt that reform to the respective responsibilities and accountabilities of Ministers and public servants would require a change in the relationship between Deputy Ministers and Ministers. There wouldn't be much point in making reforms if it didn't. Reform would also alter the Deputy Ministers' relationships to their departments and to the centre, the Privy Council Office and the Prime Minister. Reform would strengthen the Deputy Ministers' commitment to their statutory and other responsibilities for management of their departments. Deputy Ministers are the focus of the sorts of reforms the Accounting Officer model suggests. These reforms go beyond the

Glassco Commission's theme that Deputy Ministers be allowed to manage, "Let the Managers Manage," and the Lambert Commission's "Make the Managers Manage" to a more demanding issue: "The Managers Must Manage."

4 A Canadian Solution

Two conclusions stand out from this study of the responsibilities and accountabilities of Ministers and Public Servants in Britain and Canada. First, there is a problem with the incoherence, confusion and lack of clarity in the Canadian Government's views on the respective responsibilities and accountabilities of Ministers and Deputy Ministers. These views have a profound impact in creating confusion over who, Minister or public servant, holds responsibility and should be held accountable. This lack of clarity in turn handicaps Parliament in its efforts to ensure probity in financial administration. The one clear point seems to be the Government's contention that Deputy Ministers are accountable only inside Government and that all accountability to or before Parliament is to be by Ministers. Second, the Canadian Government has not been prepared to recognize a role for Parliament in interpreting the principle of ministerial responsibility or what statutory provisions relating to responsibility and accountability should mean in practice.

These conclusions are all the more disturbing because Parliament and Government both have tasks to perform in sorting out the processes for accountability to Parliament. So far the dialogue between Parliament and Government has not been conducted in a useful way: The Government has stated its views; Parliament has proposed change; the Government has flatly rejected it. The resolution of differences requires a dialogue between Government and Parliament, not the sort of confrontation that was evident in the Government's summary dismissal of the Public Accounts Committee's proposals in May 2005 for reforming the accountability of Deputy Ministers.

Ministerial responsibility is only one of three central doctrines related to responsibility and accountability in the Canadian Parliamentary-Cabinet system of government. The other two are the supremacy of Parliament and the rule of law. Parliament makes the laws, and Parliament is entitled to claim a share of ownership of the principle of ministerial responsibility and what it means in terms of the accountability of Ministers and public servants in parliamentary forums.

The need for a dialogue is all the more important because some of the Canadian Government's views on responsibility, accountability and the role of Parliament are based on questionable grounds. For example, the Government's contention that Parliament has no authority to oversee compliance with laws does not accurately reflect the constitutional position of Parliament. The Government's views on the accountability of Deputy Ministers does not accord with its own definitions of responsibility, accountability and answerability. Its contention that Parliament does not want to make a distinction between the responsibilities of Ministers and public servants runs against the evidence: both the Special Committee on Reform of the House of Commons of 1985 and the Public Accounts Committee in its report on *Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability* supported making this distinction. Up to now, Parliament has not been able to make the distinction between the responsibilities of Ministers and public servants because the Government has not made the distinction in its many formal descriptions of the accountability roles of Ministers, Deputy Ministers and other public servants.

Statutes and rules currently in force establish a regime for deputy ministerial responsibility for ensuring regularity and propriety in financial administration. The Government's interpretation of accountability to Parliament means, however, that even though Deputy Ministers have these statutory powers, only Ministers can be held accountable by Parliament. This interpretation of the principle of ministerial responsibility lacks clarity and causes confusion.

An effective system for financial accountability does not require change to the statutory responsibilities of Deputy Ministers, but it does require change to the way Deputy Ministers are held accountable. Parliament and Government have common interests in ensuring regularity, propriety and value for money in financial administration. The instruments for ensuring these elements of financial accountability are, on the parliamentary side, the Auditor General and the Public Accounts Committee, and, on the Government's side, the Deputy Ministers and the Treasury Board. Two parts of a coherent and effective system are missing in Canada: first, an appropriate focus on the accountability of Deputy Ministers, the persons who hold clearly assigned statutory responsibilities for financial administration; second, a Treasury Board that supports both the Public Accounts Committee and the Deputy Ministers in the quest for probity in financial administration.

The four agencies that need to be involved in the attainment of an effective accountability regime for financial administration are, first, Deputy Ministers, the persons who hold statutory responsibility for administration; second, the Treasury Board, the central agency with responsibility for ensuring that financial administration meets acceptable standards; third, the Auditor General, who performs an audit of the Government's use of funds; and fourth, the Public Accounts Committee, which investigates issues raised in the report of the Auditor General. In Canada, unlike Britain, these agencies do not cohere to create an effective system for financial accountability to Parliament.

Canadian practices took their present form under the different conditions of the past, when the Public Accounts Committee was weak and ineffective, when a strong role for Ministers in the details of financial administration was an accepted practice, and when controls through central agencies of government dictated a minor role for Deputy Ministers. Much has changed. The roles of the various bodies have not adapted to accommodate these changes. The purpose of reform should be to ensure that each of these players performs the appropriate role and that, together, they create an effective, coherent system for accountability to Parliament for financial administration.

4.1

The Deputy Ministers

The Government's view that Deputy Ministers appear before the Public Accounts Committee solely to answer on behalf of their Ministers is the key point at issue in accountability for financial administration to Parliament. The arguments the Government offers to support this view are not convincing. The alternative, which has been supported by a royal commission, a Prime Minister and parliamentary committees, is for Deputy Ministers to be held accountable before the Public Accounts Committee for program management and departmental administration. The matters for which they are responsible and held accountable must be clearly described. To accomplish this objective, it is recommended that

- *Deputy Ministers be accountable in their own right as the holders of responsibility before the Public Accounts Committee. It must be recognized and accepted by all involved that the responsibility of Deputy Ministers for the use of their statutory and other powers is personal and cannot be delegated.*

The statutory and other responsibilities of Deputy Ministers are restricted to the administration of the department for which they are the public service head. Reforms must recognize that broader national or public interests will at times come into conflict with the departmental responsibilities of a Deputy Minister. The decision that the broader interests should prevail is a political one and should be made by politicians, not by public servants. There are times when the collective and individual ministerial responsibility of Ministers must prevail, even if it bends or breaks rules. To ensure that an appropriate balance is achieved, a formal process should be established through which Ministers can overrule Deputy Ministers.

Correspondence related to ministerial overrulings of Deputy Ministers should be forwarded to the Treasury Board Secretariat. This correspondence would be available there for the Office of the Auditor General to examine in the course of its audit work. Forwarding this correspondence to the Public Accounts Committee (which, contrary to what has been said by some Canadian observers, is not the British practice) would risk encouraging extreme partisanship in the Committee. The Auditor General is in a position to take a careful look at the correspondence and at issues involved in ministerial overrulings, and to provide a considered report on them to the Committee. It is therefore recommended that

- *The Government establish a formal process through which a Minister can overrule a Deputy Minister's objections on matters related to the powers that Deputy Ministers hold in their own right.*

- *These overrulings be recorded in correspondence between Minister and Deputy Minister. This correspondence should be transmitted to the appropriate officer in the Treasury Board Secretariat and be available for examination by the Office of the Auditor General.*

It has recently been proposed that confusion over responsibilities and accountabilities could be resolved if, "when faced with proposed transactions that fall within the Deputy's authorities and responsibilities, but which the Deputy Minister does not want to approve," Deputy Ministers either inform the Minister that they will "not approve them or accept personal responsibility and accountability before a parliamentary committee."[illegible] This proposal contains no provision for ministerial overruling of a Deputy Minister.

Adoption of this proposal would violate the principle of ministerial responsibility. As has been shown, there can be very good reasons for a British Minister to overrule an Accounting Officer on the basis of national or public interest, or to resolve a problem in a way satisfactory to the Minister, Accounting Officer and Treasury. Deputy Ministers should not be put in the position of having to make decisions that violate the statutes and other rules they are required to observe, even if these violations might be considered desirable in terms of a perceived public or national interest. Political judgments are not made on the same basis as administrative judgments, and, in the British and Canadian systems of Parliamentary-Cabinet government, when there are disagreements between Ministers and public servants, the judgment of Ministers should prevail. That is what the principle of ministerial responsibility demands.

At present, the tenure of Deputy Ministers in a department is too brief. They should remain in an office long enough to ensure that they can properly exercise their management responsibilities and be held accountable for them. The Canadian Public Accounts Committee expressed concern over this issue in its May 2005 report, as, previously, had the Lambert Commission and Gordon Osbaldeston. It is recommended that

- *Deputy ministers serve in an office for three to five years.*

4.2

The Treasury Board

As the central management agency of the Government, the Canadian Treasury Board should play a more active role in the processes of accountability to Parliament for financial management. It should be more actively involved with both the Public Accounts Committee and Deputy Ministers. It is recommended that

- *The Treasury Board prepare a protocol that instructs and informs Deputy Ministers on the scope of those matters for which they hold personal responsibility and are liable to be held accountable before the Public Accounts Committee.*

- *This protocol be agreed to by the Public Accounts Committee and establish the ground rules for the appearance of Deputy Ministers as witnesses before the Committee.*

Other officials besides Deputy Ministers hold responsibilities for financial management in their own right—heads of special operating agencies and government programs that do not fit into the normal departmental category such as the RCMP, Parole Board, and Corrections Canada. Most Crown corporations and government-financed foundations are now subject to audit by the Office of the Auditor General. The chief executive officers of these non-departmental agencies should appear before the Public Accounts Committee in the same capacity and relationship as Deputy Ministers. It is recommended that

- *The Treasury Board maintain a list of heads of the agencies and the managers of horizontal initiatives that are subject to audit by the Office of the Auditor General and advise them of their accountability before the Public Accounts Committee.*

In Canada the task of reporting back to the Public Accounts Committee on action (or inaction) on its recommendations rests with the Auditor General. The Government, not the Auditor General, has responsibility for managing financial administration. This reporting role is not an appropriate one for the Auditor. It more appropriately belongs to the Treasury Board. It is recommended that

- *The Treasury Board report to the Public Accounts Committee on the action taken by the Government on the Public Accounts Committee's recommendations.*

4.3

The Public Accounts Committee

The Government contends that the Canadian Public Accounts Committee does not always act in a non-partisan manner. While that is correct, so also is the fact that the Committee acts in a non-partisan manner most of the time. The Committee becomes partisan when it investigates issues that the Government has made partisan: those in which questionable decisions involve Ministers. The focus of the Public Accounts Committee's concerns and investigation should not be questions about the merits of policies but of how policies have been administered, and in particular the issues related to regularity, propriety, economy and efficiency. These issues are located at the administrative end of the policy-administration spectrum. When there is ministerial involvement in these areas, the issue becomes political and partisan and, as was evident in the Public Accounts Committee's investigation into the Sponsorship affair, becomes fodder for battles between the Government and the Opposition. The Government's insistence that Ministers are accountable for all actions of public servants, including those taken by Deputy Ministers under the statutory powers that they, and they alone, not Ministers, possess, contributes to elevating administrative matters into partisan ones.

The vital function of ensuring probity in financial administration is assigned to the Public Accounts Committee, a responsibility that it performs on behalf of Parliament and, more broadly, for the people of Canada. In accomplishing this fundamental task, the Public Accounts Committee must be fair and even-handed in its investigations. When the witnesses before the Committee are public servants, the Committee should avoid dividing along party lines. The current rules regarding confidentiality of advice to Ministers, and the responses to question about policies, should continue to be observed by the Committee. If the Government wishes to do so, explicit processes for guarding confidentiality could be included in the protocol regarding the responsibilities and accountabilities of Deputy Ministers prepared by the Treasury Board. It is recommended that

- *Deputy Ministers, as public service heads of departments, others holding equivalent positions, and the heads of other government agencies be the main witnesses before the Public Accounts Committee.*

The Public Accounts Committee, like other committees of the House, suffers from frequent changes in membership. This changeover is especially evident when the Committee conducts an investigation into a political scandal, as it did in the Sponsorship affair. If the Committee is to perform its functions effectively, its membership should be more long term and steady. It is recommended that

- *Members of the Public Accounts Committee be expected to serve on the Committee for the duration of a Parliament.*

4.4
The Auditor General

The Office of the Auditor General currently plays an appropriate role in the processes of accountability to Parliament. Two changes have already been recommended: first, that the function now performed by the Office of reporting to the Public Accounts Committee on the Government's actions in response to its recommendations be transferred to the Treasury Board; second, that the correspondence relating to ministerial overrulings of Deputy Ministers be available in the Treasury Board Secretariat for examination by the Office of the Auditor General in the course of its audits.

4.5
The Process of Implementing Reforms

Implementing reforms will require adjustments and accommodations on the part of Government and the Public Accounts Committee. Many persons and agencies will be involved, and the process will require change in political and administrative cultures. The Public Accounts Committee should review the Government's progress in implementing reforms. It is recommended that

- *The Government report annually to Parliament on progress made in implementing reforms.*

The Government's reports should be as precise as possible in their commitments on such matters as the identification of who holds responsibility, what timelines it intends to follow, what resources are required, and what has been achieved and are in place. The Auditor General should review and comment on these reports. It is recommended that

- *The Auditor General comment on the status reports from the Government on progress in reform. The Public Accounts Committee should carry out an annual review of the progress in making reform, as described in the Government's reports and the Auditor General's comments.*

Note

These reforms cannot by themselves prevent abuses in financial administration. However, they will ensure that there is no confusion over who holds the responsibility when abuses occur. That should make abuse less attractive and less likely. The greater focus on financial management and probity demanded of Deputy Ministers and heads of agencies will also encourage more concern for probity. It will ensure more openness and transparency in the Government's accountability to Parliament for the management of the public purse. Deputy Ministers and others responsible for financial administration could do worse than to remember the question that the British Treasury recommends Accounting Officers ask themselves if they have doubts about a proposed course of action: *Could I satisfactorily defend this action before the Public Accounts Committee?*

And, since accountability to Parliament is part of a wider accountability, the question can be put even more simply: *Could I satisfactorily defend this course of action in public?*

Appendix A:

The Ministerial Direction over the "Advanced Jet Trainer—Hawk 128"

On July 29, 2003, Sir Kevin Tebbit, the Permanent Under-Secretary of State and principal Accounting Officer at the Ministry of Defence, wrote to his Minister, the Secretary of State for Defence, offering formal advice on how to proceed in the Advanced Jet Trainer Project. This letter was classified as "Restricted-Commercial" and not made public. The Minister responded on July 30, in a letter subsequently made public, thanking the Permanent Secretary for his "formal advice" and complimenting him for having "summarised clearly the range of issues which I [the Minister] have been discussing with Cabinet colleagues." The Minister informed the Accounting Officer that he had carefully considered the points he had made but that had made his decision:

> As you know, the Government attaches considerable importance to maintaining an innovative and competitive UK defence industry. An order for a new advanced variant of the successful Hawk aircraft would support our high technology aeronautical capability, including skilled jobs, and assist future exports of Hawk variants. Having weighed up the military, industrial and economic factors, I have therefore concluded that the Department should proceed, subject to successful contractual negotiations, with an initial order of 20 Hawk 128 aircraft and options up to the full requirement of 44.

The Minister concluded: "I shall be grateful if you and CDP would now proceed accordingly."

On August 5, 2003, Sir Kevin, as Accounting Officer, wrote to Sir John Bourn, the Comptroller and Auditor General, informing him that he had "sought and received a Ministerial Direction on value for money grounds" and "had no concerns in terms of the regularity and propriety of the Defence Secretary's decision." Sir Kevin attached the relevant correspondence to his letter and concluded:

> I understand that you will now inform the Chairman of the PAC of this exchange. Both my request for a Direction and the Secretary of State's response are classified as Restricted-Commercial. My minute, in particular, remains commercially sensitive even after the announcement of the Secretary of State's decision, and on those grounds and as internal advice to Ministers, I would not want to see its public release. I would be happy to talk through with you the terms in which you might write to Edward Leigh MP [the Chair of the Public Accounts Committee] if you would find that helpful.

The same day, the Accounting Officer wrote to the Treasury Officer of Accounts informing him of the ministerial direction he had sought and received, and telling him that he had informed the Comptroller and Auditor General, who "will now inform the Chairman of the PAC and consider whether the issue merits further investigation."

The Public Accounts Committee examined Sir Kevin Tebbit on this ministerial direction in February 2004, in the context of its investigation of a report by the Comptroller and Auditor General on major projects in the Ministry of Defence.[54] Edward Leigh (the Committee's Chair) asked Sir Kevin Tebbit how he justified the decision of the Secretary of State. Sir Kevin's responded:

> If I may say so it is not for me to do so. I advised the Secretary of State and went through the proper process. He took my advice, discussed it with his colleagues in the Cabinet and came to a decision. That is the government's decision which I will implement to the best of my ability.
>
> Chairman: What was it that led you to seek the direction? Were you aware of the industrial capacity arguments and the employment argument when you asked for direction? Why did you seek the direction in those circumstances?

> *Sir Kevin Tebbit*: I was aware of those considerations. They were not considerations that I ignored, but I gave my advice which balanced, in my view, the various considerations. Ministers then looked at these issues and made a decision. I cannot say more than that, the detail of my advice to the Secretary of State has to remain confidential. It is now a matter for the Secretary of State.[55]

The Public Accounts Committee did not hear testimony on this subject from the Secretary of State for Defence. It took note of the ministerial direction in its report, but made no comment about it. The Public Accounts Committee's concerns begin and end with administrative, not policy or political issues. Ministers are not witnesses before it, despite the Committee's power to summon them. Subsequently, after reviewing the relevant documentation, the British Parliamentary Ombudsman upheld the withholding of the correspondence between the Minister and the Accounting Officer and related documents on this issue on the grounds that, to release the information, was not in the public interest because, on balance, it would cause more harm than good.[56]

Appendix B:
Sir Tim Lankester and the Pergau Dam

In 1991 the British Overseas Development Administration (ODA), after three years of internal discussion and controversy, decided to spend £234 million on the Pergau Dam project in Malaysia, the largest commitment for a single project ever made through its Aid and Trade Provision program. In 1993 the Comptroller and Auditor General, in a highly critical report on the Pergau Dam project, stated that the Permanent Secretary and Accounting Officer of the ODA, Tim Lankester, had advised against funding the project, but that his formal written objections had been overruled by the Minister, Sir Douglas Hurd, the Secretary of State for Foreign Affairs.[57]

The Pergau Dam became one of the very rare occasions when disagreement between an Accounting Officer and a Minister has become public. Both the Public Accounts Committee and the Foreign Affairs Committee of the House of Commons later investigated the issue. By the time the dust had settled, *The Times* alone had printed over 50 articles, editorials and letters on the Pergau project. This widespread publicity made the Pergau Dam not only the largest such aid project in British history but also a considerable *cause célèbre.*

Not the least of the concerns of Parliament and press was that British aid for the Pergau Dam had been entangled with commitments from Malaysia for arms purchases. Indeed, the Commons Foreign Affairs Committee concluded that a protocol signed by the two governments did appear to link the two, which was contrary to British law.[58] The press added allegations of kickbacks and inflated contract prices in Malaysia to this already potent and illegal mix of arms and aid. At one point the Malaysian Prime Minister, in objecting to these press reports, for seven months banned contracts of his government with British companies. Also added were allegations that British companies with close ties to the Tory Government stood to benefit from the project.

The Accounting Officer's objections to the project in his memorandum of dissent had, however, been on economic grounds. As he told the Public Accounts Committee, "this project was unequivocally a bad one in economic terms." Sir Tim Lankester's memorandum of dissent (he was honoured with a KCB in 1993) had not been on questions of regularity or propriety, but on economic — value for money — aspects, which were so unfavourable that he concluded he required a ministerial direction in order to proceed.[59] Sir Tim assured the Committee "that the ODA concentrated exclusively on the economic, the technical, the financial, and commercial aspects of the project and that any idea of linkage with arms sales never came into it."[60] The department had not considered the question of the project's legality. It had no lawyer on staff.

Under the then-existing rules, a written dissent by an Accounting Officer on the basis of propriety or regularity, and the ministerial response, had to be passed on to the Comptroller and Auditor General. This transmittal was not required for dissent on the grounds of economy, efficiency and effectiveness, though the National Audit Office was to be made aware of ministerial direction if it were conducting any relevant inquiry. Because Sir Tim's dissent had been on economic grounds, the relevant papers were not passed on to the Auditor General, nor were they made available to the Public Accounts Committee in its investigation. Apparently the Auditor General's own concerns had triggered the Pergau investigation, not the formal objection by the Accounting Officer.

Not the least of Sir Tim's economic concerns had been that the contract price for the project increased from £316 million to £397 million, by over 25%, only two weeks after the agreement between the two Prime Ministers had been reached. The Public Accounts Committee concluded that "it was right and in accordance with his responsibilities that the Accounting Officer advised Ministers that he would require a direction before spending money on this project."[61] The Government, the

Committee was told, had decided to proceed because Ministers did not wish to renege on an earlier commitment given to Malaysia at the highest level, and because they considered that there might be serious consequences for British companies and British exports if the aid were refused. The Secretary of State, Sir Douglas Hurd, transmitted to the Committee his views that the Accounting Officer had carried out his responsibilities correctly, but that, as Minister, he had overruled this advice because, from his wider perspective as Minister, there were possible harmful consequences for British companies and British exports to Malaysia if the Government had backed away.

There had been thorough discussions within the department, between Sir Tim Lankester and his Minister, and between the Minister and his ministerial colleagues before the Accounting Officer registered his objections and was overruled by the Minister. Sir Tim did not consult with the Head of the Civil Service (Cabinet Secretary) before registering his objection, though that avenue was open to him. He considered the issue his to resolve. The project did not meet the stated objectives of the program. The purpose of the foreign aid program was to increase the economic well-being of the recipient country. The Pergau Dam project did not meet this objective and, therefore, it should not be supported under this program.

Press reportage of the Pergau Dam issue consistently and strongly criticized the Government. The implications of sleaze, and the actual findings of blithe disregard of economy and efficiency, in this massive expenditure took their toll in public opinion. Ecological concerns compounded the economic and legal objections. A London-based pressure group, the World Development Movement, mounted a legal case against the Government on the basis that funding for the Pergau Dam contravened the Act of Parliament which says that the primary purpose of British aid should be the economic benefit of a country or the welfare of its people. The British High Court concurred, ruling that using money from the Overseas Development Administration budget to build the dam was illegal. Although the Government did not appeal this judicial decision, it continued with the project, funding it from reserves. At the same time, it declined to restore to the aid budget the £34 million already spent on the Pergau project.

A key recommendation of the Public Accounts Committee in its report on the Pergau issue was that, in future, when a Minister takes any decision involving public expenditure against the advice of his senior civil servants, whether on economic or other grounds, a copy of the note of dissent would automatically be sent to the Public Accounts Committee. The process that was adopted was for the formal objections by Accounting Officers to be transmitted to the Comptroller and Auditor General.

In 1995 senior government officials reported that Ministers were planning a "savage" 40% cut in Britain's foreign aid program in revenge for the department's exposure of the illegal and uneconomic use of aid money in the Pergau Dam project. These cuts were much more severe than those faced by other government departments and flew in the face of government commitments to increase the aid budget.[67] It was claimed that the Treasury supported Ministers in making these punitive cuts to the aid budget.

Sir Tim Lankester, who had been a high flyer in the upper levels of the British civil service (he had been a Deputy Permanent Secretary at the Treasury before heading the Overseas Development Administration, and had been Private Secretary to Prime Minister Margaret Thatcher in 1979-81), left his post as Permanent Secretary to the Overseas Development Administration in 1994 and became Permanent Secretary to the Department of Education. This post became redundant in 1995 because of government reorganizations. In 1996 Sir Tim retired from the civil service at the early age of fifty-two and became Director of the School of Oriental Studies at the University of London.

This very unusual case illustrates the constitutional principles underlying the position of Accounting Officer very clearly.[83] Once the Minister had overruled the Accounting Officer's objection, the Minister, not the civil servant, had the responsibility and was held accountable by Parliament. As the Treasury states, once an Accounting Officer has objected in a memorandum of dissent and been overruled in writing by a Minister, the Public Accounts Committee "can be expected to recognise that the Accounting Officer bears no personal responsibility for the transaction."[84] The Public Accounts Committee in its investigation simply put the events on record and clarified that Sir Tim's dissent had been solely on economic grounds; in no way was he asked to explain or defend the Pergau decisions. The Public Accounts Committee called no Ministers as witnesses; its concern is with the responsibilities and accountability of civil servants. In contrast, Sir Douglas Hurd and several other Ministers and ex-Ministers testified before the Foreign Affairs Committee, though, on the basis of precedent, former Prime Minister Margaret Thatcher declined to do so.

Sir Timothy Lankester was far from anonymous in the Pergau affair. He personally had objected in writing. If he had not objected, he personally would have been responsible for this very dubious expenditure and would have been held accountable by the Public Accounts Committee. But once he had been overruled by the Minister, he no longer had this responsibility. The doctrine of individual ministerial responsibility was upheld.

With very rare exceptions, the informal processes of discussion and negotiation between Ministers and civil servants allow disputes to be resolved without this sort of formal written objection by the Accounting Officer. Occasionally, senior officials do ask Ministers to put proposed actions into writing, whether because of legal dubiety or financial impropriety. This request, with its intimations of trouble to come, is normally enough to deter a Minister. The personal responsibility of the Accounting Officer has become a powerful force in the hands of the bureaucracy in disagreements with Ministers to enforce compliance by Ministers with the bureaucratic norms of regularity in financial and related transactions. Perhaps the Tory Government, because it had been so long in power and had grown complacent if not arrogant, not only felt that it could override civil servants' objections with impunity but also could intrude into civil service management much more than was conventional British practice. Liz Symons, the General Secretary to the First Division Association, told the Nolan Committee investigating standards in public life that senior civil servants were increasingly being asked by Ministers to act outside accepted guidelines. She added that the FSA had evidence from senior civil servants whose careers had been damaged by giving Ministers "unwelcome" advice.[65]

The doctrine of collective responsibility of Ministers was also upheld in the Pergau affair. Many other Tory Ministers besides Sir Douglas Hurd, including Prime Ministers Thatcher and Major, had been involved in the decisions. A former Secretary of State, Lord Younger, accepted responsibility for the offending protocol that had linked aid with arms, becoming what *The Times* called "the fall guy."[66] The electorate passed its negative judgment on the record of the Tory Government in the general election of 1997.

By the time the Pergau affair was over, the ramifications went far beyond the concerns of the Public Accounts Committee. In fact, that Committee's review of the matter was much more restricted than that of the Foreign Affairs Committee. The system of accountability through Accounting Officers worked well: an important question of economy and propriety in public expenditure was brought to the attention of Parliament; responsibility for going against the established standards for financial management was squarely placed with the Ministers; the conduct of both officials and Ministers was reviewed by parliamentary committees; and the electorate was allowed to make an informed judgment on the Government's conduct of public business. The Pergau affair also led directly to reforms to the system of audit itself, becoming another important case in the evolution of audit through the Public Accounts Committee, Auditor General and Accounting Officers.

Endnotes

---

[1] United Kingdom, Treasury Memorandum, *Responsibilities of an Accounting Officer* (no date), paras. 5–6.

[2] United Kingdom, HM Treasury, *Regularity and Propriety: A Handbook*, July 1997, p. 4.

[3] Ibid., pp. 6, 8.

[4] These and the following quotations are from ibid., pp. 24–25.

[5] United Kingdom, Treasury, *Guide to the Scrutiny of Public Accounts*, 2004, para. 2.12.

[6] United Kingdom, Treasury, *Value for Money Assessment Guidance*, August, 2004, para. 1.1.

[7] Ibid., para 1.3

[8] Treasury, *Guide to the Scrutiny of Public Accounts*, para. 2.26.

[9] Vernon Bogdanor, "The Civil Service," in Vernon Bogdanor, ed., *The British Constitution in the Twentieth Century* (Oxford: Oxford University Press, 2003), p. 267.

[10] Treasury, *Responsibilities of an Accounting Officer*, para. 11.

[11] Ibid., para. 22.

[12] These data are from Peter Barberis, *The Elite of the Elite: Permanent Secretaries in the British Higher Civil Service* (Aldershot: Dartmouth, 1996), pp. 181–98.

[13] Treasury, *Responsiblities of an Accounting Officer*, para. 28.

[14] This and the following quotations are from Barberis, *The Elite of the Elite*, pp. 222–27.

[15] United Kingdom, Cabinet Office: *The Armstrong Memorandum: The Duties and Responsibilities of Civil Servants in Relation to Ministers*. Note by the Head of the Home Civil Service—the "Armstrong Memorandum" 1985, as amended on July 17, 1996.

[16] From United Kingdom, Cabinet Office, *Guidance on Codes of Practice for Board Members of Public Bodies*, October 2004.

[17] Treasury, *Guide to the Scrutiny of Public Expenditure*, October 2004, para. 4.6. Also, *Responsibilities of an Accounting Officer*, para. 30.

[18] Ibid.

[19] Correspondence to the author from Brian Glicksman, Treasury Officer of Accounts, June 15, 2005.

[20] Treasury, *Responsibilities of an Accounting Officer*, para. 26.

[21] All quotations are from Treasury, *Guide to Scrutiny*.

[22] Treasury, *Guide to Scrutiny*, para. 7.2.

[23] Peter Hennessy, *Whitehall* (London: Pimlico, 2001), p. 332.

[24] Canada, *Government Response to the Tenth Report of the Standing Committee on Public Accounts*, August 2005.

[25] Ibid. (my italics).

[26] Peter Aucoin, "The Staffing and Evaluation of Canadian Deputy Ministers in Comparative Westminster Perspective: A Proposal for Reform" (study prepared for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, August 2005).

[27] For more detail, see Part 3.

[28] This tradition, and the consequent enthusiasm of the Opposition in Parliament for scandal-hunting, is examined in more detail in Part 3, in the discussion of partisanship in the Public Accounts Committee.

[29] Barberis, *The Elite of the Elite*, p. 224.

[30] Lambert Commission, *Final Report*, recommendation 9.2, p. 189.

[31] Canada, House of Commons, Public Accounts Committee, *Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability*, 10th Report, May 2005.

[32] Privy Council Office, *Responsibility in the Constitution*, 1977, pp. 78-79.

[33] Gordon Osbaldeston, *Keeping Deputy Ministers Accountable* (Toronto: McGraw-Hill Ryerson, 1989), p. 168.

[34] Ibid., p. 195 note 7.

[35] Canada, Standing Committee on Public Accounts, *Evidence*, February 21, 2005, p. 3.

[36] Privy Council Office, *Responsibility in the Constitution*, pp. 78-79.

[37] Ibid.

[38] Government Response to the Tenth Report of the Standing Committee on Public Accounts, August 2005.

[39] Kathryn May, "Gomery: Accountability Based on Old-Style Government," *Ottawa Citizen* September 12, 2005.

[40] Privy Council Office, *Responsibility in the Constitution*, pp. 78-79.

[41] *Report of the Special Committee on Reform of the House of Commons* (McGrath Committee), June 1985.

[42] Public Accounts Committee, *Governance in the Public Service of Canada*.

[43] Norman Ward, *The Public Purse: A Study in Canadian Democracy* (Toronto: University of Toronto Press, 1962), pp. 275-76. See also Desmond Morton, "Reflections on Gomery: Political Scandals and the Canadian Memory," *Policy Options* 26 (5) (2005): 14-20.

[44] For example, when Jean-Jacques Blais took over the portfolio of Solicitor General during a period of parliamentary excitement over scandalous behaviour by the Security Service of the RCMP in 1978, he responded to the first question directed at him about events that took place during the tenure of his predecessors by saying that he would not discuss them. Subsequently he sat silent in his place when opposition members asked this sort of question.

[45] Government of Canada, *Final Submissions* (to the Gomery Commission), para. 86. This claim is repeated in the Government's *Response to the Tenth Report of the Public Accounts Committee*.

[46] Privy Council Office, *Guidance for Deputy Ministers*, 2004, 3.2(a), and *Responsibility in the Constitution*, p. 87.

[47] Government of Canada, *Final Submissions*, para. 81.

[48] James Ross Hurley, "Responsibility, Accountability, and the Role of Deputy Ministers in the Government of Canada" (study prepared for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, September 9, 2005), p. 20.

[49] House of Commons, *Governance in the Public Service of Canada*, 10th Report, p. 37.

[50] *Government Response to the Tenth Report of the Standing Committee on Public Accounts* (my italics).

[51] All quotations from Privy Council Office, *Guidance for Deputy Ministers*.

[52] Peter Aucoin and Mark D. Jarvis, *Modernizing Government Accountability: A Framework for Reform* (Ottawa: Canada School of Public Service, 2005), p. 17.

[53] Ibid., p. 80.

[54] *Ministry of Defence: Major Projects Report: 2003*, Report by the Comptroller and Auditor General, HC 195 Session 2003-2004: January 23, 2004.

[55] United Kingdom, Public Accounts Committee, *Oral Evidence*, February 23, 2004, Questions 12-14.

[56] United Kingdom, Parliamentary and Health Service Ombudsman, *Investigations Completed July 2004–March 2005*, Part Two: "Ministry of Defence, Department of Trade and Industry and HM Treasury."

[57] United Kingdom, National Audit Office (NOA) Report, *The Pergau Dam Project*, 1992–93, HC 908.

[58] United Kingdom, House of Commons, 1993–94, Foreign Affairs Committee, Third Report, *Public Expenditure: The Pergau Hydro-Electric Project, Malaysia, The Aid and Trade Provision and Related Matters*, "Defence Exports and Aid Provision," pp. ix–xx.

[59] United Kingdom, House of Commons, Committee of Public Accounts, 1993–94, Seventeenth Report, *Pergau Hydro-Electric Project, Minutes of Evidence*, January 17, 1994, p. 5.

[60] Ibid., p. 6.

[61] Ibid., p. vi.

[62] Geoffrey Lean, "Ministers Slash Aid in Revenge for Pergau," *The Independent*, September 17, 1995.

[63] See Anthony Barker and Graham K. Wilson, "Whitehall's Disobedient Servants? Senior Officials' Potential Resistance to Ministers in British Government Departments," *British Journal of Political Science* 27 (2) (1997): 236–46, 227–28.

[64] Treasury Memorandum, *Responsibilities of an Accounting Officer*, paras. 13–14.

[65] Nigel Williamson, "Defiant Ministers Lose Right to Secrecy," *The Times*, February 2, 1995. See also Barker and Wilson, "Whitehall's Disobedient Servants?" pp. 224–25.

[66] "Younger Accepts Blame," *The Times*, March 4, 1997.

MINISTERIAL RESPONSIBILITY AND THE *FINANCIAL ADMINISTRATION ACT*: THE CONSTITUTIONAL OBLIGATION TO ACCOUNT FOR GOVERNMENT SPENDING

Stan Corbett

1 Introduction

It has been argued that the dominance of the political executive is a central, if not the defining, feature of the constitutional order that Canada inherited from the United Kingdom.[1] While today's Cabinet may not merit Bagehot's characterization of its 19th century British model as the "efficient secret" of the Constitution, it remains true that Cabinet is the "connecting link" between the legislature and the executive.[2] This principle of Canada's inherited Constitution is in constant tension with another principle derived from that same tradition, namely the requirement that the executive cannot spend public money without the prior authorization of Parliament. That said, even in Bagehot's time "the Cabinet was in relatively firm control of the entire political system" and Bagehot's praise of its role in government may have "somewhat underestimated how far it had already captured the legislative initiative from parliament."[3] The danger that Cabinet may use its control over the legislature to usurp parliamentary control of the law-making — and by implication the spending — power underlies the third principle of Westminster government, ministerial responsibility, a principle that contains under the Canadian Constitution both political or conventional, and legal elements.

It is essential that the concept of ministerial responsibility be seen in this context. While often regarded as the defining feature of the Westminster model, it is, in fact, only intelligible with reference to the more fundamental principles of parliamentary sovereignty and rule of law. Ministerial responsibility is commonly regarded as a form of accountability. Any meaningful concept of accountability requires the existence of someone with the authority to hold the Minister to account. Parliamentary sovereignty requires that the executive be accountable to the legislature; rule of law holds the executive accountable before the courts. The separation of powers implicit in this model is, of course, imperfectly realized in the Westminster model, especially in the age of party politics. However, although Canada is often said to have a Westminster system of responsible government, that system is significantly different from its counterpart in the United Kingdom. In other words, while it is true to say that the separation of powers is not fully realized under the Canadian Constitution, it is equally true to say that the Westminster model of responsible government is not fully realized either.

Canada differs from the United Kingdom in having a written Constitution in which the supremacy of law has been explicit since 1982.[4]

In this regard, at least, Canada is closer to the United States.[5] Judges can, and have, prevented governments from changing the law. As Justice Bora Laskin noted 30 years ago:

> The question of the constitutionality of legislation has in this country always been a justiciable question.[6]

In exercising this power, the Canadian courts are clearly much closer to their American counterparts than they are to any court in the United Kingdom. By combining Westminster representative government with a written Constitution, Canada has from the beginning shared features of the constitutions of the United Kingdom and the United States. In addition to the role of the courts under the Canadian Constitution, our hybrid Constitution also includes a legal source for ministerial responsibility.

2 Ministerial Responsibility in Canada

The Canadian courts have occasionally endorsed the view that there is a straightforward separation of powers in the Canadian Constitution. For example, in *Fraser v. Public Service Staff Relations Board* the Supreme Court of Canada outlined the functions of the three branches of Government as follows:

> There is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.[7]

However, in other cases the Supreme Court has acknowledged that the role of the executive is somewhat more complex than the foregoing passage would suggest. While the Courts have recognized the inherent ambiguity of the word "government," it is clear in the following passage from *Reference Re Canada Assistance Plan* that the term is being used to refer to something that is controlled by a victorious political party.

> Once a government is in place, democratic principles dictate that the bulk of the Governor General's powers be exercised in accordance with the wishes of the leadership of that government, namely the Cabinet. So the true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of overlap among the terms "government", "Cabinet" and "executive." . . . The government has the power to introduce legislation in Parliament. In practice, the bulk of the new legislation is initiated by the government.[8]

More recently, in *Wells v. Newfoundland*, the Court was even more explicit on the nature of the actual relationship between the executive and the legislature:

> The separation of powers is not a rigid and absolute structure. The Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and de facto controls the legislature.[9]

As the last two passages make clear, the Court is aware that the doctrine of separation of powers finds special application within the Canadian context. Indeed, insofar as the idea of separation of powers applies in Canada, it is in the role of the courts vis-à-vis the legislature and the executive rather than in the relation between the executive, understood to include the Cabinet, and the legislature, which includes ministers. The line between the legislature and the executive separates the dual roles of individual Cabinet ministers. The obligation to respect the separation of powers is an essential part of the idea of ministerial responsibility. As executive actors, ministers are subject to the constitutionally protected supervisory jurisdiction of the superior courts and, as legislators, they are subject to the authority of the courts to rule on the constitutionality of legislation. Put more concisely, both as lawmakers and as executive actors, ministers are subject not only to the democratically expressed will of Parliament, but also to the rule of law.

Ministers, of course, are more than just lawmakers and executive actors. They are also partisan political actors, members of the party that won the election. The advent of party politics with its demands for loyalty to the interests of the party has long been recognized as posing a particular threat to countries governed under the Westminster model. For example, in his Reith Lectures in 1951, Lord Radcliffe commented on the effect of party discipline upon the role of Bagehot's "connecting link" in the English Constitution. He noted:

> The executive and lawmaking power are to all intents and purposes the same, because both powers have fallen into the same hands, those of the ruling political party.[10]

Almost 30 years later, Lord Scarman went even further when he expressed the same concern in somewhat more dramatic terms:

> We have achieved the total union of executive and legislative power which Blackstone foresaw would be productive of tyranny . . . The judges will maintain the rule of law, but cannot prevent government from changing the law, whatever the nature of the change.[11]

Both Lords Radcliffe and Scarman were addressing the consequences of party solidarity within a constitutional order in which Parliament is sovereign but the sovereign is effectively controlled by the executive, that is to say, within the United Kingdom. In that context "maintain(ing) the rule of law" means ensuring that laws are applied in accordance with the principles of the rule of law; it does not mean challenging the constitutionality of the laws themselves. The situation in Canada is quite different.

The conventional elements of ministerial responsibility—namely, the political costs borne by ministers for the failings of their departments—have been the subject of a great deal of debate in recent years and they will not be the subject of the present study. Since ministerial responsibility is typically thought of as a political convention, it may sound odd even to speak of its legal aspects. Indeed, its legal elements have not received much attention. One of the few places in which the legal basis of ministerial responsibility is clearly recognized is in *Responsibility in the Constitution*, a document issued by the Privy Council Office and originally written as a submission to the Lambert Commission in 1977. According to this account:

> Ministers exercise power constitutionally because the law requires it and Parliament and their colleagues in the ministry hold them responsible for their actions under the law . . . this legal individual responsibility of ministers reflects the theory and law of the constitution and remains a practical force because of the conventional responsibility of ministers to the House of Commons and the statutory basis on which ministers are charged with the administration of the public service.[12]

For a fuller account of "the legal basis of ministerial responsibility," readers are referred to A.V. Dicey's account of ministerial responsibility in his *Introduction to the Law of the Constitution*. According to Dicey:

> Ministerial responsibility means two utterly different things. It means in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons.

> This is a matter depending on the conventions of the Constitution with which the law has no direct concern.
>
> It means, when used in its strict sense, the legal responsibility of every Minister for every act of the Crown in which he takes part.[13]

What is most striking about Dicey's account is the fact that he was dividing individual ministerial responsibility into two distinct types, namely, the conventional and the legal. The authors of *Responsibility in Government* were drawing the more common distinction between individual and collective ministerial responsibility, characterizing the former as legal and the latter as conventional. Under the former, ministers are responsible for the actions of their departments while under the latter ministers are responsible for the policies of their government.[14]

Collective ministerial responsibility is actually different from either of the two forms identified by Dicey. Like Dicey's forms, it is also a form of individual responsibility insofar as it requires that ministers who are unable to support the policies of their government must resign. Those who choose to remain in power will justifiably be burdened with the implication that they supported the government. Like Dicey's first form of responsibility, this third form is also correctly regarded by the authors of *Responsibility in Government* as largely political in nature, insofar as there is no legal obligation upon a Minister to resign from Cabinet in either case. It is Dicey's second form of responsibility, what he calls the "strict sense," that the Privy Council Office recognized as "the legal and ancient" foundation of the concept of ministerial responsibility in the Canadian Constitution.[15]

This means that individual ministers are legally, not just conventionally, responsible for every act of their departments in which they play a part. Clearly, this does not mean that they are personally liable, in a civil or criminal sense, for every act of wrongdoing committed by a member of their departments during their term in office. There is a distinction between personal wrongdoing and maladministration. That said, the point of holding ministers legally as well as politically responsible for the actions of their departments is to draw attention to the fact that the Minister is responsible under the Constitution for ensuring that the business of the Department is conducted in accordance with the rule of law. This is more than a matter of politics or convention. The line between law and convention is, of course, not a precise one. As Geoffrey Wilson notes regarding the Constitution of the United Kingdom, law and convention

> are not like bordering territories. Not only do law and convention often overlap and intertwine, the line between them is often arbitrary and changing.[16]

The line between law and convention is often drawn by referring to the courts. Rules and practices that are enforceable by the courts have legal content; those which cannot be so enforced do not. Eugene Forsey, who characterized the law as the "skeleton" and conventions as the "sinews and nerves" of the Canadian Constitution noted with regard to the difference:

> The law of the Constitution is interpreted and enforced by the courts: breach of the law carries legal penalties. The conventions are rarely even mentioned by the courts. Breach of the conventions carries no legal penalties. The sanctions are purely political.[17]

It is a matter of some importance, therefore, whether ministerial responsibility is placed within the legal or the conventional part of the Canadian constitutional order. Forsey maintained that, since "there is not one syllable" in the Constitution referring to ministers or the Cabinet, ministerial responsibility belonged within the domain of convention.[18]

Others, like Dicey, have argued, however, that the legal component of ministerial responsibility, even in the United Kingdom, is actually its defining feature. In an essay on the difference between the pre-modern and the modern concepts of ministerial responsibility, George Burton Adams characterized the modern form as follows:

> Ministerial responsibility, operated by what we call party government, is the method of coercion applied in such a constitution to the actual, not to the theoretical, executive. It has for its object not merely to compel the executive to regard the fundamental law of the state, which is a principle now so thoroughly established that it is never likely to be questioned, but also to carry out in the details of government the policy which Parliament decides upon.[19]

Adams's account of ministerial responsibility is important in the present context because it draws attention to the two essential legal components in the idea, namely the constitutional and the legislative. Furthermore, unlike Forsey who defined the legal in terms of penalties, Adams recognized that the primary purpose of legal responsibility is "to compel the Executive" to obey the law.

The threat of penalties is only one form of compulsion, and the penalties themselves are, by definition, imposed only after the fact. Applications for judicial review of executive action, constitutional questions before the courts, and the prospect of being held civilly liable for damages are also ways in which the law, or the threat of its use, can be understood to compel the executive.[20] Compulsion presupposes the legal authority to compel. In other words, the law and those who are empowered to articulate it provide both the foundation for all executive action as well as the basis for external oversight of that action. The executive is bound by the Constitution in all administrations while particular administrations are also bound by the will of the legislature, insofar as that will finds expression in constitutionally acceptable legislation. That the will of the legislature changes from Parliament to Parliament is, of course, a commonplace, but the underlying principle remains the same. Even if the political executive exercises *de facto* control over the legislature, the principle of parliamentary sovereignty within the bounds of the Constitution requires that any change to the legal basis of executive action must be subject to the public scrutiny of parliamentary debate. The executive cannot act in defiance of the law. Along with a great deal else, this fact means that the executive cannot spend public money except in accordance with the law.

3 The Constitutional Basis of Ministerial Responsibility

In a recent defence of the virtues of the English Constitution, Adam Tomkins contrasted the English Constitution with the Canadian.[21] Defending the English "historical" model of public law against court enforced "principled" alternatives, he used the Supreme Court of Canada's judgment in the *Quebec Secession Reference* as an example of a bad principled judgment reflective of legal rather than political constitutionalism. In his criticism of the decision, he claimed that the Court picked the principles of federalism, democracy, constitutionalism and rule of law, and respect for minorities out of thin air.[22] The problem with this reading of the *Secession Reference*, and of the Canadian Constitution, is that it ignores the clear fact that the Court picked the principles out of the text of the Constitution itself, a document the courts have long held must be interpreted with reference to historical development. Lord Sankey's justly famous characterization of the Canadian Constitution as a "living tree" was intended to capture the idea of a constitution as a balance between principle and change.[23] In the *Quebec Secession Reference*, the Supreme Court was simply following in the footsteps of a well-established tradition of constitutional jurisprudence.

Approval by the House of Commons of all expenditures of public money is required by the *Constitution Act, 1867*.[24] This is not a matter of constitutional convention, nor is it a principle plucked out of thin air, it is a legal requirement. It would be a breach of section 53 of the *Constitution Act, 1867*, for Cabinet to authorize the spending of public money without approval from the House of Commons. Section 53 provides:

> Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

According to the Supreme Court, "Section 53 is a constitutional imperative that is enforceable by the courts."[15] While section 53 clearly has the effect of preventing money bills from originating in the Senate, it equally clearly gives expression to the role of the House of Commons in approving all spending of public money.[16] The wording reflects the principle of parliamentary control over the spending of public money derived from the *English Bill of Rights*.[17] Justice Major characterized section 53 as codifying "the principle of no taxation without representation," the same principle that underlies the English *Bill of Rights*.[18] Justice Major continued:

> The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for taxation.

While *Eurig Estate* dealt with the second part of section 53—namely, the imposing of a tax—it is readily apparent that, if that part of the section is enforceable by the courts, the opening section must be as well. In other words, the opening words of section 53, "Bills for appropriating any part of the public revenue" is also "a constitutional imperative that is enforceable in the courts." If these words are read in the same fashion as the second phrase, then it is clear that the House of Commons cannot "incidentally" delegate the spending power. All delegation of the authority to spend public money must be explicit.

The section immediately following deals with the role of the political executive in the appropriation of public revenue. Section 54 reads:

> It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any purpose that has not been first recommended to that House by Message of the Governor General in the session in which such Vote, Resolution, Address, or Bill is proposed.

In practice, of course, "Message of the Governor General" means a Bill originating in Cabinet. Like the cases concerning the meaning of section 53, cases dealing with section 54 have been concerned with taxation.[29] For example, in *Reference re: Agricultural Products Marketing Act, 1970 (Canada)* Justice Laskin found that levies authorized by the Act were not taxes and as a result were not subject to sections 53 and 54. While Laskin's finding on the issue of taxation was endorsed by the entire Court, the Court split on the question of whether these sections could ground an application for judicial review. The majority sided with Justice Pigeon who held that Parliament could indirectly amend sections 53 and 54 by clearly delegating taxation powers to the executive. Dissenting on this issue, Justice Laskin held that Canadian courts were not bound by British precedents that went to the relation between the Constitution and the courts.[30] While the Court held in *Eurig Estate* that section 54 was not engaged on the facts of the case, it is clear that the same reasoning that makes section 53 justiciable would also apply to section 54. One of the consequences of the patriation of the Constitution in 1982 is that the courts have sided with Laskin over Pigeon. This does not mean that the federal government could not amend sections 53 and 54 under the authority of section 44 of the *Constitution Act, 1982*, merely that they would have to do so explicitly and in public.

In the cases dealing with section 54, a distinction has been drawn between appropriating and imposing taxes, and section 54 has been held to have the effect of restricting the role of the House to approving or disapproving appropriations from the public revenue to requests that originate in the executive branch. The passage quoted earlier from *Reference Re Canada Assistance Plan* concludes:

> By virtue of s. 54 of *the Constitution Act, 1867*, a money bill, including an amendment to a money bill, can only be introduced by means of the initiative of the government.[11]

Taken together the effects of sections 53 and 54 are that governments must publicly request funds from the House of Commons, the true guardians of the public purse, for publicly identified purposes and, once authorized, those funds must be spent for the purposes for which they were requested.[12]

It is by virtue of the House's constitutional authority to approve all appropriations that it also has the authority to take steps to ensure that the money is actually spent for purposes that have been approved. Indeed, without the surveillance power of the House, the requirement for approval would collapse into a mere formality. Section 53 of the *Constitution Act, 1867*, is the constitutional basis of ministerial responsibility for the expenditure of public money, a legal foundation that provides the House of Commons with the authority to place legal limits upon executive spending. In other words, the House has the constitutional authority to enact legislation with the purpose of ensuring the compliance of the executive and to monitor and, if necessary, to enforce compliance. This is not to suggest that the courts should play an increased role in supervising the exercise of the spending power by the House of Commons, merely to make clear that there is a constitutional basis for their performing such a role, a basis that is, if necessary, enforceable in the courts. The primary purpose of the foregoing argument is to show that the courts have recognized the constitutional basis in law, not convention, for the House to exercise its supervisory authority over executive spending. It goes without saying that without the authority to spend the executive would be impotent.

4 The Statutory Basis of Financial Accountability

Since 1951, the *Financial Administration Act* (FAA) has been the primary statutory instrument by means of which the House of Commons endeavours to ensure that public money is only spent for purposes that have received its approval.[13] The wording of section 26 of the Act clearly gives expression to the principle of no taxation without representation:

> Subject to the *Constitution Acts, 1867 to 1982*, no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament.

Since the Act in its present form applies to all money in the Consolidated Revenue Fund, no government expenditure lies outside its scope. Furthermore, the Act applies to "any person" in receipt of public funds, whether those funds have been disbursed by the Government or have been received on behalf of the Government. Given this language, it is readily apparent that the scope of the statute extends well beyond spending by government officials to include all spending and acquiring of public money. As a legal instrument, the Act should be understood as one of the means whereby the House of Commons fulfills its constitutional obligation to hold the executive accountable for the spending of public money. Understood in this way, the Act is intended to impose certain legal obligations upon the political executive, obligations that constitute the statutory legal component of ministerial responsibility.

The *Financial Administration Act* replaced the *Consolidated Revenue and Audit Act*, a statute that had its origins in the pre-Confederation *Audit Act* of 1855. Significant amendments were made to the *Financial Administration Act* in 1967, following the report of the Glassco Commission (1962) and again in 1984 following upon the Lambert Report (1979).[14] More recently amendments were made to the Act in 2003, changes that took effect on April 1 of this year.[35] While clearly motivated by the need for parliamentary oversight of government spending, these amendments have reflected a pattern described by Norman Ward in 1962 as "a steady accumulation of power in executive hands, with parliamentary assent."[36] Ward, who regarded the Financial Administration Act as "admirably lucid" and a "good" statute, noted:

> (by) its clear separation of functions, and their allocation to specific officers, the *Financial Administration Act* not merely made statutory a system of financial control which was unique in the Commonwealth, but also greatly facilitated parliamentary surveillance of it.[37]

Hodgetts et al. agreed with this assessment of the Act, commenting with regard to the powers of Treasury Board that the term "'clarify' perhaps best describes the effects of the 1951 Act."[38] However, Ward also noted that the Act

> altered none of the basic principles of parliamentary control of finance in Canada, but reaffirmed them, clarifying and enlarging several important concepts and definitions . . . [39]

In the end, Ward's judgment of the statute may be summarized in terms of the tension between the claim that the Act "carried still further the process of centralizing the executive control of finance" and the claim that it "greatly facilitated parliamentary surveillance" of the executive. It can be said that, in enacting the *Financial Administration Act* and its various amendments, Parliament has placed a great deal of the responsibility for conducting surveillance of the executive in the hands of the executive itself.[40]

At first glance, the most striking feature of the *Financial Administration Act* may well be its scope. This is clearly evident in the number of different types of official financial transactions to which it applies. As already noted, the purpose of the Act is to keep track of public money. Public money may be expended on the services of individuals who are employees working under collective agreements, "managers" who are not members of unions, individuals whose terms of appointment vary from fixed term to "at pleasure," individuals working for Crown corporations and other quasi governmental organizations, as well as those working under a wide variety of contractual arrangements. The only common feature of all of these arrangements is the fact that in every case the individual is in receipt of public money, whether in the form of a salary or on the basis of invoices for services rendered. In addition, every individual with the authority to spend public money is subject to the Act. Finally, every individual who in the course of providing a service for the Government is in receipt of money intended for the Consolidated Revenue Fund is also covered by the Act.

The distinctions between money received for services rendered, money received in the course of rendering services, and the spending of public money are important because each type of transaction attracts a different form of attention, a form dependent to a large degree upon the context in which the transaction took place. While it may be possible to characterize any number of transactions as inappropriate, only some of them will attract legal attention and the remedies available will likely depend more on the context than on the nature of the transaction itself. Rather than focusing on the nature of the various financial exchanges covered by the Act, it will be easier to look at the different categories of individuals engaged in such transactions.

The Act applies to government departments, other government agencies, Crown corporations, and to any parties engaged in financial transactions with such departments, agencies and corporations. Under the current, recently amended, version there are seven schedules appended to the statute that list the various government departments and agencies to which the Act applies, an increase of three from the earlier versions.[41] The seven schedules are headed Departments (Schedule I), Divisions or Branches (Schedule I.1), Departmental Corporations (Schedule II), Crown Corporations (Schedule III, Part I & Part II), Portions of the Core Public Administration (Schedule IV) and Separate Agencies (Schedule V). The "core public administration" is defined as Schedules I and IV while the "public service" includes Schedules I, IV and V, as well as "any other portion of the federal public administration that may be designated by the Governor in Council for the purpose of this paragraph."[42] The differences between the "core public administration," the "public service," and the "federal public administration" are significant insofar as they are subject to different parts of the Act.[43] Similarly, departmental corporations and Crown corporations are not part of the public service and are not subject to those parts of the Act that apply thereto.

The Act clearly applies in very different ways to departments, agencies and corporations, many of which are also subject to numerous other pieces of legislation. For example, the difference between members of the public service, the "core public administration," and those others to whom the Act also applies is evident in the application of sections 11-13 in Part I and sections 76-82 in Part IX. Under the heading "Human Resources Management," the former sections set out the responsibilities of Treasury Board and its delegates, most importantly deputy heads, with regard to the overall responsibility of managing the core public administration.[44] For example, section 11.1(1)(f) grants Treasury Board the discretion to supervise deputy heads by establishing policies and issuing directives respecting any powers granted to deputy heads under the Act and by setting out the ways in which deputy heads are required to report to Treasury Board regarding the exercise of their assigned powers.

Part IX of the Act is entitled Civil Liability and Offences. This Part of the Act has been subject to only minor amendments since the statute was first enacted. The definitions of civil liability and of the offences created under this section are expressed in the most general of terms, clearly indicating that they are in addition to, rather than separate from, the disciplinary measures established on the basis of the earlier sections. Since anyone from a Minister to a clerk within the public service, or from the director of a Crown corporation to someone working under a contract with a subsidiary of such a corporation, is subject to Part IX but only the clerk would be subject to the disciplinary measures set out under the authority of sections 11.1(1)(f) and 12(1)(c) the procedures that would be followed in the case of a clerk who had violated the Act would be very different than those that would be followed in the case of a director of a Crown corporation.[45] Given the scope of Part IX and the varied problems that are likely to arise in its enforcement, it will be helpful to consider the issue of liability under the Act in terms of the different groups to whom it applies. These comprise three different categories of individuals or corporate entities who could be in receipt of public money, those subject to sections 11-13 of the Act, the directors, officers and employees of Crown corporations, whether parent or subsidiary, and all those who provide services to the Government or its agencies on a contractual basis. In what follows, it will be important to bear in mind the distinction between those parts of the Act that apply to all of the above and those that apply only to one or two of the categories. Before proceeding, it will be useful to examine briefly some of the general concerns that the Act is intended to address as an instrument of policy. These concerns can best be defined in terms of the familiar concepts of "responsibility," "accountability" and "liability."

5 Responsibility, Accountability, Liability

In a well-known paper, written almost 20 years ago, Gerald Caiden noted that, although these terms — responsibility, accountability, liability —

are often used interchangeably, they should be differentiated and treated as a complex set of related concepts, rather than as synonyms. Although the literature on these concepts has expanded dramatically in the intervening years, Caiden's advice is still well worth heeding. He briefly defined the three terms as follows:

- To be responsible is to have the authority to act, power to control, freedom to decide, the ability to distinguish (as between right and wrong) and to behave rationally and reliably and with consistency and trustworthiness in exercising internal judgment;
- To be accountable is to answer for one's responsibilities, to report, to explain, to give reasons, to respond, to assume obligations, to render reckoning and to submit to an outside or external judgment;
- To be liable is to assume the duty of making good, to restore, to compensate, to recompense for wrongdoing or poor judgment.[46]

From a legal perspective it might appear as if the third of these concepts, liability, has the greatest legal content but any such assumption would be misleading. Indeed, to characterize one of these concepts as legal would be to miss the point of Caiden's advice that the concepts should be distinguished but not separated.

In the case of public officials, or anyone dealing with public monies, responsibility will flow from a legal delegation of authority. An individual will be responsible for performing a legally delegated set of duties or responsibilities whose scope will be set out in a statute, regulation or job description. The same individual will be legally required to account for the performance of those duties to someone with the legal authority to demand such an account. Finally, the individual may be held liable — administratively, civilly or criminally — not only for the failure to perform the delegated duties, but also for the failure to account for his or her performance or non-performance. From a legal perspective, liability will not be "assumed," as Caiden would have it, but imposed by a body with the jurisdiction to do so. It doesn't follow from the fact that one has taken responsibility for something that one has any legal liability at all. Legal liability is not up to the individual to assume, it is always something imposed on someone after the requisite procedures have been followed. Liability, whether criminal, civil or administrative, is the outcome of a process, not its beginning point.

Although the distinction between the failure to meet one's responsibilities and the failure to account for those responsibilities is central to the *Financial Administration Act*, the statute is more precisely concerned with ensuring that individuals account for the performance of responsibilities assigned elsewhere. Those responsibilities will usually be defined in the statute establishing the government department or the Crown corporation, or in the various regulations, job descriptions, guidelines and codes enacted thereunder. Like all such "umbrella" legislation, the *Financial Administration Act* must be made to apply to a very diverse group of actors. There is, however, a single underlying burden placed upon all of those individuals, the obligation to account. The scope of the burden to account to Parliament is further emphasised in section 76(1)(c), which refers to "any person" who "has received any public money applicable to any purpose." That said, the discretion to spend and the structure of accountability clearly vary from individual to individual. Nonetheless, the clear purpose of the Act is, wherever possible, to hold all of those charged with responsibility for public funds to a common standard of accountability to Parliament.

"Accountability" has become one of the most overused words in the literature on public administration. Richard Mulgan noted in a recent article:

> That "accountability" is a complex and chameleon-like term is now a commonplace of the public administration literature. A word which a few decades ago was used only rarely and with relatively restricted meaning (and which, interestingly, has no obvious

> equivalent in other European languages) now crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic "governance" (itself another conceptual newcomer). In the process, the concept of "accountability" has lost some of its former straightforwardness and has come to require constant clarification and increasingly complex categorization.[47]

Caiden's admonition that it should be distinguished from the related concepts of responsibility and liability clearly has not had the effect of reining in the abuses of the term. In addition to the growth in the scope of the term, there has also been, as Mulgan notes, a dramatic expansion in the number of types of accountability. For example, in an often-cited paper written after the explosion of the space shuttle Challenger, Barbara Romzek and Melvin Dubnik distinguished between bureaucratic, legal, professional and political accountability on the basis of the relationship between the person(s) held accountable and the person(s) to whom accountability was owed.[48] In a similar vein, writing in the field of health policy, Emanuel and Linda Ezekiel distinguished between professional, economic, and political accountability.[49] However, in spite of the frequency with which such distinctions are drawn, it isn't always clear why they are necessary. Indeed, in many cases, the implication of these efforts at categorization is that there are fundamentally different types of accountability, rather than different contexts within which one might be held accountable. Yet, surely this latter understanding of accountability is closer to what is actually the case.

To be accountable is to be in a relationship to someone with the authority to demand or, more significantly, to require an account. The essential element in an accountability relationship is not the obligation to account, it is the existence of someone with the authority to require an account. The authority to require an account will often include the authority to impose a sanction for the failure to account. This authority may rest directly with the person authorized to require an account or it may depend upon the engagement of some other source of legal authority such as a court. The authority to require an account will be limited by the grant of that authority.[40] In any case, the authority to require an account may be coupled with the authority to sanction, or to initiate a sanction, for the failure to meet the requirement.

Just as it is possible to speak of the responsibility to provide an account, it is also possible to speak of the responsibility to require an account. Indeed, accountability is best understood as the correlation of two responsibilities, the responsibility to provide an account when required, and the responsibility to require an account. Either, both or neither of these responsibilities might have been met in a particular case. It follows from this analysis that the accountability relationship should also be understood in such a way that liability might fall on both parties to the relationship. The failure to require an account, when possessed with the responsibility to do so, would attract liability in precisely the same sense as the failure to provide one when required to do so. Those charged with the responsibility of requiring an account should be held to the same standard as those charged with the responsibility of providing one.

On the basis of the foregoing analysis, accountability may be understood as an additional responsibility for which one may be held liable. An individual assigned a set of responsibilities will also be assigned the responsibility to account. To take a relatively simple example, the requirement that a public official keep a record of transactions may also be an assignment of the responsibility to account. The record is kept not only for the purpose of keeping track of the transactions within the Department but also to serve as an accounting of those transactions to another party with the authority to require access to the records. Among the duties assigned to this other party will be the responsibility to require an account. While the responsibility to provide an account, like the responsibility to require an account, may be the primary or sole duty of an official, it is much more likely within any bureaucratic structure that these responsibilities will be only part of the official duties of an individual. Indeed, a pure accountability relationship between two individuals would be impossible since coupling the sole duty to require an account with the sole duty to provide one would leave both parties to the relationship with nothing to account for. An office, like that of the Auditor General, for example, clearly can be created with the responsibility to require an account from one body (the executive) and the responsibility to provide that account to another body (Parliament).

While the forms in which an account is to be given will vary depending upon the nature of the request or demand, in each case the same basic elements are present. The authority to require an account will be exercised by setting a variety of requirements, ranging from statutes and regulations through guidelines and policy directives to more informal arrangements, such as regular staff meetings. At the highest level, the *Financial Administration Act* may be understood as an exercise of Parliament's constitutional authority to require an account from the executive. Parliamentarians, in particular those with the greatest degree of control over the legislature, will be held politically accountable by the electorate for their failure to call the executive to account. In addition, sanctions for the failure to account may range from an informal reprimand to loss of one's position and, in the most extreme cases, civil and criminal liability. The *Financial Administration Act* is one of the ways in which Parliament imposes the responsibility to account on the executive, although, as noted earlier, the primary emphasis in the Act is on the relations between Cabinet and those departments, corporations and agencies that are answerable to Cabinet. Furthermore, as noted earlier, the tension between the interests of Parliament and those of Cabinet is ever present, a potential limitation on the effectiveness of the Act insofar as the responsibility for its enforcement rests with the executive.

As noted at the outset, the doctrine of ministerial responsibility contains both political and legal elements. It is important to recognize both of these. The subjection of the executive branch of Government, up to and including the political executive, to law is one of the most important principles of the Canadian legal order. Whether the instrument of legal ordering is Parliament, through the enactment of such legislation as the *Financial Administration Act*, or the Courts, through the exercise of the power of judicial review, the underlying principle is the same: all executive action must be undertaken in accordance with the law. According to the Supreme Court, the first principle of the rule of law, "a fundamental postulate of our constitutional structure," is that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power."[51] There are legal boundaries to the responsibilities of any public official that derive from the principle of the rule of law, boundaries that are legally, not just politically, enforceable. Minimally, rule of law means that no official, no matter how high ranking, can possess absolute discretion.[52] All discretion is bounded by law. It is presupposed in law that for all occupants of public offices, from the lowest to the highest, there are limits to what the occupant is legally permitted to do while in office. These limits are likely to be far more precisely spelled out in the job descriptions of those who occupy offices in the lower parts of the hierarchy than they will be in the case of those at the highest level, where rules and regulations are likely to be replaced by the delegation of a discretion that may be interpreted in terms of notions of privilege and convention.

Discretion is the authority to make decisions in particular cases without seeking authorization from someone with greater authority; it is an essential feature of all executive decision-making. The application of rules to particular cases inevitably requires an element of judgment that resists codification. In *Results for Canadians: A Management Framework for* *the Government of Canada*, a "modern management agenda" published by the Treasury Board, it is noted that the delivery of government programs and services requires that "decision-making authority [be] located at the right level to achieve results."[53] "Real decision-making authority at the front line" is a synonym for the exercise of discretion by the individual dealing with specific cases and may be understood as the most recent version of what became the slogan of the Glassco Commission, "Let the managers manage." The fact that a decision-maker does not have to seek authorization to make a particular decision or rule, does not mean that the decision-maker is not accountable for the decision or rule that is made. In other words, discretion does not imply freedom from the obligation to account. In *Results for Canadians* it is clearly recognized that

> [e]xtending decision making to the front line must be accompanied by a framework to ensure due diligence in the management of public funds. The framework must start with clear accountabilities so that managers at all levels understand them and support the accountability of their organizations, through ministers, to Cabinet and Parliament.[54]

As argued above, the common element in all forms of accountability is the obligation to explain or to justify one's actions to someone else who has the authority to demand an account—the obligation to provide an account, along with the correlative duty placed upon another party to require an account. Ideally each office-holder would know the limits of his or her authority and would operate within those boundaries. From a practical point of view, there are innumerable reasons why individual office-holders fail to respect those boundaries, reasons ranging from the praiseworthy to the truly malevolent. Furthermore, since each office only exists in terms of its relations with other offices, the legal limits of one office can only be defined in terms of these relations. For example, many office-holders are required to take direction from other office-holders who are in a position to exercise authority over them.[55] This authority can take many forms ranging from the ordering of the performance of a specified task to a role in recommending a promotion. Although these forms of authority can be separated for the purposes of analysis, in practice they are not so easily taken apart. The individual office-holder who orders that a cheque be issued is the same individual who will be involved in the next performance review. It may be very difficult in practice for someone in a subordinate position to challenge what a person in authority characterizes as a legitimate exercise of discretion. In addition, since accountability for the exercise of discretion is typically owed to someone higher up, it is all but impossible for a subordinate to hold a senior official accountable.[56]

The exercise of discretion can, of course, be challenged in the courts. From the standpoint of administrative law, interest in the exercise of delegated discretion has focused on specific exercises of statutory authority that have a direct impact upon the interests of individuals, for example, property and civil rights. The reasons for this focus are obvious. The law regarding discretion has evolved as a result of applications for judicial review brought by individuals who believe their rights have been adversely affected by those with "real decision-making authority." In their supervisory role, the courts have imposed procedural and substantive limitations on the exercise of discretion in individual cases. Within modern bureaucratic states, however, the domain of discretion has been extended well beyond the authority to make decisions in individual cases to encompass the authority to make the rules that will be applied in those cases. Some grants of statutory authority must now be understood to include not only the power of decision-making but also the power of rule-making.

Regulations (or secondary legislation) and guidelines (also known as soft law) are forms of executive law-making. The authority of the executive to make rules has long been recognized as a potential source for abuses of power. One of the most important reasons follows from the fact that the introduction of an intermediate step between law-making and its implementation complicates the problem of accountability. The executive branch of Government is empowered by statute to make rules, which are not brought before Parliament, and to oversee the application of those rules to individual cases by means of administrative tribunals, which are not courts. In other words, the modern administrative state has evolved in such a way that the executive sets many of the rules that govern decision-making, as well as controlling the tribunals that serve as the overseers of the application of those rules. This development is further complicated under the Westminster system of ministerial responsibility because, as noted above, the Cabinet, a partisan body, effectively controls the executive branch.

From the perspective of administrative efficiency, every rule cannot be subject to the rigours of parliamentary debate nor can every decision be the subject of an application for judicial review. That said, the fact that the executive branch controls not only the decision-making process but also the rule-making process and the appointment of the officials who will interpret and apply those rules further increases not only opportunities for the actual abuse of power, but also occasions for public suspicion that power is being abused. Since administrative structures now routinely include policy-making, rule-making, decision-making and appellate functions, the idea of the executive branch of Government as the neutral administrator and implementer of policies that have survived the rigours of parliamentary debate is more than a little misleading. Indeed, the growth of the power of the executive has made the problem of accountability even more acute. One possible response to this would be to place an increased emphasis upon the responsibility to require an account, a responsibility that should be seen as a necessary part of any accountability system.

The *Financial Administration Act* actually serves two political masters, namely, Parliament and the Governor in Council. The Act is not only an instrument for parliamentary surveillance of executive spending, it also provides the framework within which those in receipt of public money must account to Cabinet. As a committee of the Privy Council, Treasury Board is a statutory body with responsibilities to Parliament that are assigned under the Act. As noted above, this structure has the effect of making legal what might otherwise be matters of convention. That said, most of the duties assigned toTreasury Board are set out using the permissive "may" rather than the mandatory "shall." It can be argued, however, that the discretion goes to the means rather than the ends. In other words, the statute places upon Cabinet, Treasury Board and deputy heads, and, by extension, all others in receipt of public money, the legal obligation of ensuring that public money is actually spent in the pursuit of programs that have received the approval of Parliament, while leaving to the executive the choice of means whereby this goal is to be pursued and accountability is to be achieved.

Although the two purposes of the Act, ensuring accountability to Parliament as well as to the Privy Council, are not incompatible with one another they can be at odds in very important ways, ways that may well affect the exercise of discretionary power. The function of parliamentary surveillance of executive spending is performed primarily, if not exclusively, by the opposition parties in the House. Cabinet surveillance of executive spending, on the other hand, is performed by members of the party holding the reins of power. It is here that the built-in potential for conflict between the two purposes served by the Act is most evident. While Parliament has other means of keeping track of public money, most significantly, the Public Accounts Committee and the Auditor General these bodies perform their functions outside the day-to-day operations of the public service.[57] The *Financial Administration Act* applies more directly to the inner structure of the public service insofar as it creates Treasury Board and the Department of Finance and defines many of the most important duties of deputy ministers and their delegates at the highest levels of Government.

Treasury Board also possesses managerial authority over the public service. For these and other reasons, perhaps more than any other piece of legislation, the Act addresses the point at which the partisan interests of the political executive meet the traditional administrative neutrality of the public service.[58]

As the present Inquiry makes abundantly clear, a distinction must be drawn between different meanings that might attach to a phrase such as "partisan interests." The importance of drawing this distinction is evident from the following exchange between Mr. Cournoyer, Associate Legal Council for the Commission, and the Honourable Stéphane Dion during the latter's testimony before the Commission:

> **Mr. Cournoyer**: Now I'll ask you, Minister, to go to page 39 of the same volume. It's page 18 of Mr. Massé's report. At the top of page 18 we read the paragraph that follows Communication Initiative in Quebec, the following paragraph: "The ministers recommend that the organization of the Liberal Party of Canada in Quebec be substantially strengthened. This entails hiring organizers, finding candidates, identifying ridings that could provide winners at the next federal election and using the most modern political techniques to reach whoever we target."
>
> My question is the following, Minister. Isn't it surprising that considerations that can be associated with *partisan politics rather than public administration* are included in a document prepared by ministers for the Cabinet?
>
> **Mr. Dion**: Yes, it's surprising. I can tell you that I've never seen anything like it in my nine years in politics. That was probably the first document I read from the government. Perhaps it didn't strike me as odd at the time, but now, looking back, *I'm astonished that public servants would engage in these types of reflections, which pertain to partisan politics.*[59] [Emphasis added]

The use of the phrase "partisan politics" in this exchange is of interest because it threatens to mask the fact that Cabinet is a partisan body. Collective ministerial responsibility is a partisan principle insofar as it requires ministers to support the policy initiatives of the Government in which they serve. It was the discussion of the election of Liberal Party members, that is, the discussion of matters pertaining to the Liberal Party that was problematic. A discussion of how best to implement Liberal policies, that is to say, the ideological commitments of the Liberal Party, through control of the public administration, a discussion that might also be described as partisan, would not only be appropriate in Cabinet, it would be expected. The political executive is governed by partisan interests because its purposes are to implement, insofar as is politically possible and legally permissible, the platform of the Liberal Party, a platform on the basis of which the electorate granted the party control of the executive branch. As noted earlier, it has long been recognized that in a Westminster democracy in which political parties, rather than individuals, have become the key players, the political executive, a partisan body, is effectively in control of both the legislature and the administration during its term in office. Thus, although the *Financial Administration Act* is one of the legal limitations placed by Parliament upon the political executive, one of the more remarkable features of the Act is the degree to which it places the responsibility for ensuring executive compliance with parliamentary purposes upon the executive itself.

6 Recent Statements on Responsibility and Accountability

The Privy Council Office and Treasury Board both function at the point where the need to separate partisan interests from legislative and executive authority is most pronounced. It is instructive, therefore, to examine recent statements on accountability from both of these offices. In 2004, the Privy Council Office released a document entitled *Governing*

Responsibly: A Guide for Ministers and Ministers of State.[60] The document begins appropriately enough with a section on ministerial responsibility and accountability. As expected, ministers are said to be responsible and accountable in two ways, individually and collectively. Readers of the document are referred to *Responsibility in the Constitution* for further details. Under the heading of "Individual Ministerial Responsibility," reference is made to the enabling statutes that grant ministers their powers and establish their duties, and reference is made to the "'unwritten' conventions or precedents governing the ways in which Ministers fulfill their responsibilities."[61] There is no reference in this section to the legal basis of ministerial responsibility, in the sense that the law limits the ways in which ministers exercise their powers and perform their duties. A reader of the passage would be excused for assuming that the only consequences to which ministers might be subject are matters of convention rather than law.

The section on individual responsibility is followed by a much longer one on collective responsibility in which the central theme is "cabinet solidarity." Throughout this section, the importance of consultation, coordination, and consistency in Cabinet initiatives is emphasised on the ground that Cabinet solidarity is a "key 'unwritten' constitutional convention." This convention

> is further reinforced by the Privy Councillor's oath requiring Ministers to declare their opinion as decisions are being made, and to strictly uphold the confidentiality of Cabinet decision making.[62]

The emphasis upon solidarity and confidentiality creates the impression that loyalty is the defining feature of ministerial responsibility. This impression is strengthened in the following section, "Ministerial Accountability and Answerability" where attention is drawn to the Prime Minister's

> prerogative to evaluate the consequences (of the minister's performance before Parliament) and to reaffirm support for that Minister or to ask for his or her resignation.[63]

As in the other sections, there is no reference to the possibility that ministerial responsibility could include a legal obligation that would override the Minister's obligations to Cabinet or to the Prime Minister.

More recently, in a report to Parliament entitled *Review of the Responsabilities* [sic] *and Accountabilities of Ministers and Senior Officials*, the Treasury Board Secretariat characterized the political responsibility of ministers as follows:

> Political responsibility is also not the means of determining civil or criminal liability for unlawful conduct—that is the justice system. The sanctions associated with ministerial responsibility are political, ranging from public embarrassment of a minister and consequent loss of political stature at one end of the spectrum to the potential fall of a government at the other.[64]

Although this characterization of the assignment of legal liability is accurate, what is missing is any recognition of the legal foundation of ministerial responsibility itself. The essential difference between law as a source of sanctions for unlawful conduct and law as the source of authority for whose exercise one may be held accountable, even if one has not technically broken the law, lies at the very core of ministerial responsibility.

In *Management in the Government of Canada*, a discussion paper released by the President of the Treasury Board in October 2005, it is noted that:

> The deputy minister is accountable to the minister and to the Treasury Board specifically for ensuring:

- resources are organized to deliver departmental objectives, under the minister, in the most economical, efficient, and effective way;
- effective systems of external control;
- compliance with financial policies and procedures;
- staffing and human resources planning and management;
- stewardship and safeguarding public funds; and,
- sound management of resources related to horizontal initiatives.[65]

The report sets out as one of the objectives of the Government's policy of "continuous improvement" the following commitment:

> In 2006, the *Financial Administration Act* and Treasury Board policies will reinforce accountability relationships of deputy ministers to ministers and the Treasury Board.[66]

Between these two statements the accountability of deputy ministers is addressed further in the following statement:

> Deputy Ministers are not accountable to Parliament, as this would undermine the political accountabilities of ministers and would undermine the non-partisan nature of the public service. In supporting their respective minister's accountability, deputy ministers are answerable to parliamentary committees in the sense that they have a duty to inform and explain, as for example when appearing before them. Only ministers are accountable to Parliament.[67]

Finally, the different accountabilities of deputy ministers are set out in more detail in another document issued by the Privy Council Office, *Guidance for Deputy Ministers*.[68] Under the heading "Multiple Accountabilities," it is noted:

> Deputy Ministers are required to manage a complex set of multiple accountabilities which arise out of the various powers, authorities and responsibilities attached to the position . . . The Deputy is accountable to his or her Minister in relation to both individual and collective responsibilities . . . Deputy Ministers are also accountable to the Prime Minister, through the Clerk of the Privy Council . . . Deputy Ministers also have accountabilities to the Public Service Commission and the Treasury Board . . .[69]

When taken together, the preceding passages provide a relatively clear portrait of the balancing act that is the role of the Deputy Minister.

On the basis of the foregoing two things are readily apparent:

- deputy ministers are accountable to their ministers, toTreasury Board, to the Prime Minister and to the Public Service Commission;

- deputy ministers are not accountable to Parliament.

A number of things, however, are not clear.

6.1

Deputy Ministers' Direct Accountability

Deputy ministers are not accountable to their ministers, Treasury Board, the Prime Minister and the Public Service Commission for the same things. One cannot be accountable in the abstract; one must be accountable for something. Typically one is held accountable for the performance of a delegated task, duty or responsibility. Furthermore, one is held accountable by someone with the authority to require or demand an account, usually, but not necessarily, the one who delegated the task. Accountability is by its very nature a vertical relationship, a relationship in which one individual, or body, exercises authority over another individual, or body, by requiring an account. Deputy ministers are assigned different responsibilities by their ministers and by Treasury Board. They are accountable to their ministers and to Treasury Board, respectively, for carrying out these responsibilities.

6.2

Deputy Ministers' Indirect Accountability

Since ministers and Treasury Board are both accountable to Parliament, deputy ministers are indirectly accountable to Parliament. The responsibility of deputy ministers to Treasury Board is in law an indirect responsibility to Parliament since the responsibilities of the deputy ministers are delegated under a grant of authority from Parliament. Thus, although it is true to say that deputy ministers are not politically accountable to Parliament; deputy ministers are accountable to Parliament through Treasury Board for the compliance of their department with the terms of the *Financial Administration Act* and other relevant legislation. This follows from the fact that deputy ministers are accountable to the ministers and to Treasury Board for different things.

6.3

Conflict Resulting from Deputy Ministers' Accountabilities

The different accountabilities of Deputy Ministers present numerous opportunities for conflict. On the basis of the brief sketch of the responsibilities of deputy ministers, it makes sense to ask what happens when these responsibilities conflict. Since deputy ministers are accountable to their ministers, the Clerk of the Privy Council, the Public Service Commission, and Treasury Board for different things, it is necessary to ask whether there is a hierarchy among these responsibilities. In the case of a conflict, is it possible to say which responsibility takes priority?

Even a quick glance at the responsibilities assigned to deputy ministers in the list quoted above will reveal the existence of the different sources of the responsibilities. Responsibilities for "delivering departmental objectives," "human resources planning and management," and "safeguarding of public funds" clearly intersect in a number of important ways, but only the first of these is a responsibility assigned by the Minister. The latter two responsibilities have different sources that clearly cannot be overridden or ignored in the pursuit of "departmental objectives." Furthermore, the source of the responsibility creates a different relationship between the Deputy Minister and the portion of the public service for which he or she is responsible. These different relationships engage different aspects of public sector values, values grounded in the neutral, or non-partisan, nature of public service.

Departmental objectives are policies flowing from government commitments, objectives that require a non-partisan, or neutral, public service for their implementation. Non-partisan in this sense means that the public service cannot frustrate the objectives of an elected Government by taking sides against it. This means nothing more than the fact that the public service cannot have an ideological agenda of its own, an agenda that might be at odds with that of the governing party. While the Supreme Court took the opportunity to address other aspects of the idea of public service in *Fraser v. Canada (Public Service Staff Relations Board)*, this concept of neutrality was at the heart of the case.[20]

The responsibilities for human resources management and the safeguarding of public funds, however, are not assigned to deputy ministers by their ministers; they are delegated to deputy ministers by Treasury Board under an authority assigned to Treasury Board by Parliament. These responsibilities have their origins in the *Financial Administration Act* and other legislation, not in ministerial directives. Meeting these responsibilities also requires a neutral, or non-partisan, executive, but these terms now have a different sense, a sense that captures the differences between the relationships. Public servants are non-partisan in this second sense because they are required to be loyal to the institutions of Government rather than to the party in power. This second sense of neutrality is partially captured by the phrase "speaking truth to power," but it would find fuller expression in the idea of reminding those in power of the existence of the law.[71]

There is, finally, a third sense of public sector neutrality that is captured in the merit principle, a principle that is intended to prevent members of the public service from being rewarded for their service to the party in power. By removing this motive from members of the public service, the merit principle is intended to free these individuals from the need to curry favour with individuals in power, while simultaneously eliminating the possibility for those in power to use the promise of reward. Like the first two senses of neutrality, this third sense also requires drawing a distinction between the partisan objectives of the party in power and the reasons why the successful public servant may be rewarded for enabling the Government to pursue those objectives effectively.

Although it is important to recognize that the public service is required to be non-partisan in all of these senses, it is even more important not to confuse them. The loyal public servant cannot express partisan opposition to the policies of the Government in power on ideological grounds but is obliged to express opposition to government initiatives that would require breaking the law. The public servant must also be assured that decisions made in compliance with these requirements will have no impact upon opportunities for advancement. The delicate balance between these three senses of non-partisanship can be captured in the single idea that the loyal public servant is required to carry out the directives of the Government of the day within the limits of the law. While a Deputy Minister should not be concerned with advancement, no figure in the Canadian Government bears the burden of maintaining the balance between the first two senses of neutrality more directly than the Deputy Minister. Indeed, the two senses of neutrality are directly related to the two sources of the authority of the

Deputy Minister, each of which engages the occupant of this role with ministers and their departments in very different ways.

On the surface, it appears that deputy ministers must serve several masters insofar as their "multiple accountabilities" are not all owed to the same official. This surface appearance is, however, misleading because these multiple accountabilities are all grounded in responsibilities assigned by two sources, namely, the political executive and Parliament. The fact that Treasury Board is a committee of the Privy Council, which means for all practical purposes the Cabinet, does not alter the fact that the responsibilities in the *Financial Administration Act* are assigned by Parliament, not by Cabinet or by individual ministers. Powers delegated to Treasury Board by the Privy Council and then further delegated to deputy ministers retain their character as statutory powers granted by Parliament. It is in the tension between Parliament and Cabinet that conflicts between the various responsibilities assigned to deputy ministers will inevitably arise.

Parliament and Cabinet function in a complex relationship whose primary, if not defining, purpose is adversarial. Conflicts are an integral part of the system. One of the best expressions of this feature of parliamentary democracy was provided by Chief Justice Duff of the Supreme Court in the Alberta Legislation case:

> Under the constitution established by the British North America Act, legislative power for Canada is vested in one Parliament . . . Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body . . . The [Act] contemplates a parliament working under the influence of public opinion and discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism

> and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.[73]

This inherent conflict between the political executive and the legislature finds expression at every level of the public service in the tension between the constitutional and statutory structures of offices and the partisan goals of those who exercise control over them during their term in power.

One of the most important ways in which the exercise of power is controlled between elections is through the legal structure of offices. While it is true that any administration may change the structure of the public service there are certain statutory obligations placed upon public officials that can only be altered with the approval of Parliament. Furthermore, the Constitution stipulates that any changes to the public service that require the expenditure of public money receive approval from the House of Commons. In addition to establishing the administrative framework within which the executive is required to meet its constitutional obligation to account to the House of Commons, the *Financial Administration Act* places statutory duties upon Treasury Board and deputy ministers.

As already noted, deputy ministers are accountable for two different sets of responsibilities that are delegated from two different sources. They are accountable for the performance of those responsibilities to their sources. There are inescapable tensions between these responsibilities, tensions that have their roots in the structure of the

Government. It is a matter of the utmost importance that the nature of these responsibilities be defined as clearly as possible. One way of doing this is to ensure that vocabulary appropriate to one set of responsibilities is not imported into discussions of the others. For example, ministers are authorized by Parliament to spend money in the pursuit of policies that are approved by Parliament. Deputy ministers are, therefore, accountable to their ministers for ensuring that these policies are efficiently and effectively implemented by the public servants within their departments. This form of accountability lends itself to the language of initiatives, goals and performance indicators, terminology that has been increasingly borrowed from the domain of private sector management. To this extent, at least, there is some overlap between private and public sector human resource management. However, deputy ministers are not accountable to their ministers for matters pertaining to human resource management; they are accountable to Treasury Board for the performance of duties assigned to them under the *Financial Administration Act*. Furthermore, these responsibilities must be pursued within the legal framework of employer-employee relations, a framework that is set out in numerous statutes and collective agreements. While the language of goals, initiative and performance indicators overlaps with ideas of training, evaluation and promotion, for example, the laws and regulations governing employer-employee relations that must be followed do not originate with the Minister. Finally, the separation of accountabilities is further complicated by the fact that deputy ministers are also accountable for ensuring that their departments meet the legal requirements regarding the expenditure of public money that are set out in the Act.

That these three different accountabilities, which can be labelled political, managerial, and legal are interwoven in practice goes without saying. However, they are also capable of being pulled apart, not only for the purpose of analysis, but also for the purpose of defining the precise nature of the responsibilities involved. It is only when the responsibilities are precisely defined that it becomes clear why the legal responsibilities must be kept separate from the others. This problem is evident in the following passage from the discussion paper issued by the President of Treasury Board:

> a broad compliance framework is needed to reinforce public-sector values, reward performance excellence, and prescribe clear consequences for underperformance and non-compliance. Many consequences and sanctions for individuals are already in place: to foster excellence, there are performance pay, promotions, and recognition awards; for non-compliance, written warnings, suspensions, demotions, terminations, and in rare cases criminal sanctions. However, managers are not always properly supported to employ these tools; when they do so, it is not always done in a uniform manner and the outcomes of their actions are not always transparent or widely reported. This has led to a perception that there are no consequences, for misconduct or mismanagement.[74]

One implication of the foregoing is that performance, misconduct and criminal behaviour are parts of a continuum rather than distinct categories. The notion that the failure to win a promotion, the receipt of a written warning and a criminal prosecution are three steps along the same path seriously misrepresents the actual difference between measures of excellence, the failure to follow directives and guidelines, and the concept of criminal behaviour. It is justifiably taken for granted that all public servants will obey the law; it cannot be taken for granted that all public servants will perform to the same standard of excellence. Performance rewards and promotions are not given for obeying the law, nor are they awarded for accomplishing government objectives without breaking the law. Although it is true that there is a range of sanctions available for punishing wrongdoing these sanctions can only be imposed after a finding of guilt. They have no positive counterpart and are by nature retroactive. By blurring the difference between performance of the job, misconduct and criminal behaviour, a "compliance framework" sends the message that breaking the law is simply a bad performance or another form of misconduct.

The difference between performing a job and obeying the law is more readily apparent in the private sector because there is a clear institutional distinction between one's employer and the legal system. Within the private sector, the relationship between a corporation, for example, and the legal system is complex, but the fundamental difference between the two is never in doubt. In the public sector, this difference is not as clear because one's employer is also responsible for administering the legal system. The Government is not only a service provider, but is also a regulator. Furthermore, while it is possible to have debates over the merits of public versus private service delivery, debates over public versus private law-making would spell the end of law. Indeed, it is of the very essence of modern democratic lawmaking and governance that the laws find their origin in the will of the people and that Government be conducted in the name of the people. These functions cannot be meaningfully privatized. Law-making and regulation are boundary-setting activities that do not fit comfortably with concepts of management derived from the entrepreneurial ideals of pushing the boundaries in the pursuit of profit. The distinction between service provision, which may be quite broadly defined, and regulation, which may be narrowly defined in terms of the statutory authority to impose sanctions, reflects the difference between the state as an employer and the state as a prosecutor. Since the prosecutorial function has no meaningful counterpart in private sector employers, it is important to maintain the distinction when dealing with the Government as an employer. Private sector employers may evaluate and discipline their employees; they cannot prosecute them without the assistance of the state.

Concepts such as discipline and misconduct are ambiguous insofar as they appear to straddle the line between two senses of obedience, namely, the following of orders or directions, on the one hand, and acting in accordance with the law, on the other. It is appropriate to combine such concepts as performance indicators and excellence with the first idea of obedience but it would be completely inappropriate to combine them with the second. Once again, obeying the law is a precondition of performance, not a measure of it. The legal structure of a public office finds its origins in the Constitution and in the various statutes enacted in accordance with it. Rule of law means that the office defines the powers of its occupant insofar as those powers derive from and are traceable to a source in law, a source external to the office-holder. Whatever authority an office-holder exercises is delegated from elsewhere and the office-holder is always accountable to that source for the exercise of the delegated authority. Performance while in office, on the contrary, is a measure of the individual's ability to successfully meet the demands of the office while operating within its legal boundaries. Among the measures of performance might be included the capacity to assume responsibility for completing assigned tasks and exercising delegated authority.

There are, therefore, two quite distinct ways in which an office-holder may fail while in office. The office-holder may prove to be incapable of meeting the demands of the office for a wide range of reasons, reasons that are the subject matter of human resource management. The successful manager places the right people in the right offices and coordinates their activities in such a way that the objectives of the department are effectively and efficiently met. Individuals who fail to meet the demands of their offices may receive poor performance evaluations, be demoted or even be terminated. While there is a burden placed upon the employer to ensure that these actions are undertaken in accordance with the various legal requirements governing employer-employee relations, none of this involves infractions of regulations or breaking the law on the part of the employee. These latter actions belong to an entirely different category and engage a different part of the legal system.

This categorical difference is also elided into a "continuum" in Treasury Board's Report to Parliament, *The* Financial Administration Act: *Responding to Non-Compliance.* In response to the question "What is mismanagement?" is the following:

> Mismanagement could conceivably cover a range of actions from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies. In some cases, it could involve criminal behaviour such as theft, fraud, breach of trust, and conspiracy.[74]

The idea that a "simple mistake" belongs to the same "range of actions" as "theft" or "fraud" seriously misrepresents not only the difference between laws and policies, but also the difference between such fundamentally distinct categories as incompetence and criminality. Individuals who are unable to follow directions or to perform the tasks that are assigned to them are not criminals; they are either unqualified or incompetent. Individuals who achieve the goals set out for them through fraud or breach of trust are criminals whether they are competent or not.

In Treasury Board's Report to Parliament, the following passage addresses the problem of "good management" in the public sector:

> "Good management" is not just the application of a series of rules and legal instruments, and "mismanagement" cannot simply be defined as a failure to apply management rules. There is no single instrument to guide public service managers: the rules and principles

> by which they must operate are scattered in a variety of statutes, regulations authorized by those statutes, and, as described above, numerous policies and directives applicable to the internal administration of government.
>
> Good public sector management requires sound judgment that is well grounded in ethics, values and principles and *a desire to uphold the rule of law and pursue the public interest.* Rules, whether regulations, policies, guidelines, or directives should be understood and respected. *Respect for the rules does not preclude changing them to enhance program delivery or creating new ones that respect fundamental values.*[75] [Emphasis added]

The word "rules" in the foregoing passage elides an essential difference between laws and regulations, on the one hand, and guidelines, policies, and directives, on the other. Upholding the rule of law and pursuing the public interest are the foundations upon which the project of public sector management rests. They are not the objects of public sector managerial judgment; they are the defining features of the difference between public sector management and private sector management.

Although both the public and private sector are subject to law, the attitude towards laws will almost certainly not be the same in both settings. Within the private sector it is not uncommon to find an antagonism towards regulators based upon the assumption that red tape and bureaucracy stand in the way of entrepreneurship and the making of profits. As the President of Treasury Board notes:

> While it shares many . . . management challenges with the private sector, a different approach is needed in the public sector. Although conscious of the need for efficiency and value for money, the government is not driven by the profit motive.[76]

The significance of this is difficult to overstate. Moreover, it isn't just that the Government isn't "driven by the profit motive."The simple, and inescapable, fact that the public sector includes the role of regulator prevents the wholesale transplantation of the ethos of private sector management into the public service.The same point has been made with reference to the legal basis of public administration by Ronald Moe and Robert Gilmour:

> *The distinguishing characteristic of governmental management, contrasted to private management, is that the actions of government officials must have their basis in public law, not in the pecuniary interests of private entrepreneurs or in the fiduciary concerns of corporate managers.*[77] [Emphasis in original]

In support of their view of the cultural difference between the public and the private sector Moe and Gilmour cite numerous examples of private sector CEOs being

> brought in to "reinvent" or "re-engineer" this program or that agency along private sector lines (and being) shocked to find that they must meticulously obey laws and regulations and are answerable to Congress for their actions.[78]

The authors of the above statements were addressing the problem of introducing private sector management techniques into the public sector in the United States, but the principle is exactly the same in Canada.

This connection between the legal and the political lies at the very heart of a system of democratic government under the rule of law. The legal and the political are necessarily linked because it is only if the executive branch has met its constitutional obligation to inform Parliament of its activities that Parliament, and the people, will have the opportunity to hold the Government which controls the executive politically responsible. Political responsibility does not so much include acting in accordance with the law as it presupposes that the Government has met its legal obligations, both constitutional and statutory. For this reason the concept of legal responsibility cannot simply be subsumed under the general heading of ministerial responsibility if this latter term is understood in an exclusively political sense. This is why it is accurate to say the Deputy Minister is not politically accountable to Parliament and inaccurate to say that the Deputy Minister is not legally accountable to Parliament.

It has been said that "[t]he main body of the law, which most public servants follow as a matter of normal practice, is an instrument for controlling their behaviour but not for holding them accountable."[79] From this perspective, "legal accountability . . . is confined to that part of the law which lays down enforcement procedures." The distinction between control and enforcement is an important one when looking at the *Financial Administration Act* because the primary purpose of the Act is to control and enforce accountability. In other words, the Act is intended, as an instrument of control, to make accountability "a matter of normal practice" for those dealing with public money while it is also intended, as an instrument of enforcement, to hold people accountable either for their abuse of their responsibilities or for their failure to account. Within the literature on regulatory policy, a distinction is drawn between two models of control and enforcement, "compliance systems" and "deterrence systems." While the ultimate objective of each system is the same, namely, ensuring that individuals subject to rules actually follow the rules, the means of achieving this overall objective differ, and, indeed, the objectives of the systems themselves are often said to differ.[80] The important difference in the *Financial Administration Act* between those sections dealing with "Human Resource Management" and those dealing with "Liability" might be best understood as representing compliance and deterrence models of enforcement, respectively. For example, the system of human resource management in sections 11-13 is primarily concerned with ensuring compliance, while Part IX of the Act is more obviously directed at the objective of deterrence.

Albert J. Reiss has drawn the distinction between these two forms of "law enforcement" in the following terms:

> The principal objective of a compliance law enforcement system is to secure conformity with law by means of ensuring compliance or by taking action to prevent potential law violations without the necessity to detect, process, and penalize violators. The principal objective of deterrent law enforcement systems is to secure conformity with law by detecting violations of law, determining who is responsible for their violation, and penalizing violators to deter violations in the future, either by those who are punished or by those who might do so were violators not punished.[81]

Reiss, like many authors dealing with regulatory policy, was addressing the problem of government regulation of non-governmental actors. The last 20 years, however, have seen an explosive growth of the problem of what is known as "regulation within government." The "reinventing government" movement, widely identified with the work of David Osborne and Ted Gaebler,[82] has had the seemingly paradoxical effect of significantly increasing the number of regulatory structures within government itself.[83] One of the most important reasons for this has been the growth of a variety of organizations that cross the supposed divide between the public and the private sector. Although it is still possible to draw distinctions between public and private actors at each end of the spectrum, the area in the middle has become increasingly blurred by the creation of a number of bodies that are not easily categorized as public or private. Matters are further confused by the fact that the terms "private" and "public" are often little more than code words for "profit" and "not for profit," respectively.

Compliance and deterrence models of regulation can, with the appropriate adjustments, be applied to the regulation of government actors, private actors, and to those organizations and agencies that lie somewhere in between. The problem of regulating government actors, "regulation inside government," has been addressed by Christopher Hood and others who raise the provocative notion of the existence of a "regulatory state within the state." According to Hood et al., regulation inside Government

> is conceived as the range of ways in which the activities of public bureaucracies are subject to influence from other public agencies that come between the orthodox constitutional checking mechanisms . . . [the courts and the members of the legislature], operate at arm's length from the direct line of command and are endowed with some sort of authority over their charges.[84]

The authors see the emergence of the need for such regulation as a result of the loss of what Heclo and Wildavsky famously called the "village life" of the senior civil service.[85] In their discussion of this older culture of "mutuality," the authors note that in the United Kingdom "there was traditionally no statute for the public service, which for the most part was regulated under the Crown's prerogative power."[86] Viewed from this perspective the *Financial Administration Act*, like its predecessors, may be seen as an Act whereby the legislature meets its constitutional obligation to oversee the spending of public money by granting to the Crown the authority to exercise the power of regulation exercised in the United Kingdom without the aid of a statute.[87] This authority is no longer a matter of prerogative on the part of the Crown; it is an obligation imposed upon the Crown by the legislature.

7 Conclusion

Although the *Financial Administration Act* is not an example of what Hood means by regulation inside Government, it addresses the same problem insofar as it creates the framework within which the executive is given the statutory authority to regulate its own financial affairs. That said, Treasury Board and deputy ministers are charged under the Act with tasks very much like those that might be defined as intra-government regulation. However, as with all grants of statutory authority, this one brings with it the obligation to account for the exercise of that authority. This obligation is framed in terms of the more "orthodox constitutional checking mechanisms." The Act is a statutory instrument whose purpose, pursued under constitutional authority, is to subject the executive branch to the control of the legislature with regard to its financial affairs. In pursuit of this goal, the Act includes both compliance and deterrence systems of control. Indeed, one of the more striking features of the *Financial Administration Act* is the difference between the penalties set out in section 80 (deterrence) and the wording of guidelines and policy documents that deal with discipline and misconduct (compliance).

As noted earlier, the *Financial Administration Act* applies to three broad groups of individuals. Roughly speaking, these groups may be defined as members of the public administration, officers and employees of Crown corporations, and all of those working for the Government on a variety of contracts for services. Part IX of the Act sets out penalties for violations of the Act, as well as for various forms of corruption, offences similar to those found in the *Criminal Code*.[55] Section 80 applies to anyone, whether public servant or not, who is involved in any financial transaction involving public money. The scope of the section is of particular importance when one looks at section 80(e), for example, the only offence that does not have a direct counterpart in the *Criminal Code*. The section reads:

> (80) Every officer or person acting in any office or employment connected with the collection, management or disbursement of public money who . . .
>
> (e) having knowledge or information of the contravention of this Act or the regulations or any revenue law of Canada by any person, or of fraud committed by any person against Her Majesty, under this Act or the regulations or any revenue law of Canada, fails to report, in writing, that knowledge or information to a superior officer, . . . is guilty of an indictable offence and liable on conviction to a fine not exceeding five thousand dollars and to imprisonment for a term not exceeding five years.

This section has the effect of making it a serious offence for anyone not to inform on anyone else when the first party has knowledge or information regarding wrongdoing under the Act. The sanctions prescribed under this section of the Act are obviously dramatically at odds with the types of penalties that would be attached to disciplinary offences. While section 80 applies to individuals in all of these groups, other sections of the Act are far more restricted in their application, applying only to members of the public service or to Crown corporations. However, as the presence of section 80 indicates, the basic principles remain the same in each case. If the primary purpose of the Act is to ensure compliance with requirements for accountability, then the emphasis in the Act, as well as in any regulations, directives or guidelines issued under the authority of the Act, should be on defining and implementing both the duty to account and the duty to require an account. As argued earlier, the latter obligation is at least as important as the former. Since the scope of the Act is such that it covers every possible financial transaction involving public money, what is necessary is to ensure that all those in receipt of such money are made aware that it carries with it the legally enforceable obligation to account for it.

Given the remark by Norman Ward cited earlier regarding the "lucidity" of the Act, the following comment from the testimony before the Commission by the Honourable Ralph Goodale is particularly interesting. Replying to a question by Mr. Fournier, regarding possible violations of the Act, Mr. Goodale stated:

> There were ultimately some disciplinary proceedings launched but I have to tell you, Mr. Fournier, that I was pretty frustrated with the *Financial Administration Act*. It details responsibilities that officials are supposed to exercise and it describes a range of penalties that may effectively be available if those duties and responsibilities are not properly discharged.
>
> But the processes of accessing the disciplinary measures under the *Financial Administration Act* are almost impenetrable. So I, quite frankly, don't think that that provision of that piece of legislation is as effective as it should be.[89]

In its recent report, *The* Financial Administration Act*: Responding to Non-Compliance*, the Treasury Board Secretariat would appear to agree with both Mr. Ward and Mr. Goodale. In the concluding section of the report it is noted that:

> The principles behind the legislative and administrative frameworks are sound. The difficulty arises from the accumulation of rules and policies, etc. This complexity contributes to confusion and errors.[90]

Since the recommendations from this report were incorporated into *Management in the Government of Canada*, it is not surprising to find in the next paragraph a definition of "mismanagement" that places errors and mistakes on a continuum with theft and fraud. It is of the very nature of theft and fraud that they are intentional while it is of the essence of errors and mistakes that they are not. This difference is reflected in the

Act by the separation of sections dealing with Human Resource Management from those dealing with criminal and civil liability.

In 2003, the sections of the FAA dealing with Human Resources Management were significantly amended by the *Public Service Modernization Act*, changes which came into effect on April 1, 2005. Under the newly amended Act the relevant authority of Treasury Board is set out in sections 11.1(1)(f) and 11.1(1)(h):

> (f) establish policies or issue directives respecting the exercise of the powers granted by this Act to deputy heads in the core public administration and the reporting by those deputy heads in respect of the exercise of those powers;
>
> (h) establish policies or issue directives respecting the disclosure by persons employed in the public service of information concerning wrongdoing in the public service and the protection from reprisal of persons who disclose such information in accordance with those policies or directives;

Section 12(1) of the Act sets out the powers assigned to deputy heads, the most important of which for present purposes is to be found in section 12(1)(c):

> (c) establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties;

Section 12.2(1) authorizes the deputy head to delegate "any of the powers or functions in relation to human resource management" while section 12.2(2) authorizes anyone to whom such powers and functions have been delegated to delegate them "to any other person." In principle, at least, the power to "establish standards of discipline and set penalties" could be delegated to anyone, as could the power to enforce those standards and impose penalties.

Following the coming into force of the amendments to the Act in April of this year, Treasury Board exercised its discretion under section 11.1(1)(f) by issuing *Guidelines for Discipline*, to replace guidelines that had been issued by Treasury Board under section11(2)(f) of the preceding version of the Act. Under the heading "Purpose" in the new Guidelines it is pointed out that:

> The nature of discipline is corrective, rather than punitive, and its purpose is to motivate employees to accept those rules and standards of conduct which are desirable or necessary to achieve the goals and objectives of the organization.[91]

This marks a subtle, but significant, change from the wording or the earlier version which read:

> The purpose of corrective disciplinary action is to motivate employees to accept those rules and standards of conduct which are desirable or necessary to achieve the goals and objectives of the organization.[92]

Both versions of the statement of purpose clearly regard disciplinary proceedings as according more with the compliance than the deterrence model. However, the change from "corrective disciplinary action" to "the nature of discipline is corrective, rather than punitive" is a subtle but significant shift in emphasis. The reference to "the goals and objectives of the organization" in both versions of the Guidelines is important because the organization in question is one charged with implementing public initiatives with public money. The pursuit of these goals and objectives is constrained not only by the limits imposed by the statutory grant of the authority to spend but also by the constitutional obligation to account for such spending. In this context the phrase "motivat[ing] employees to accept . . . rules and standards of conduct" tends to obscure the fact that the offices they hold are themselves defined by rules. As part of the definition of the office, these rules are intended to limit the behaviour of the occupant. Ensuring that the occupants of offices comply with these rules is part of the content of ministerial responsibility.

On the basis of the foregoing, it is possible to conclude that the legal content of ministerial responsibility in Canada extends beyond the fact that ministers are required to obey the law and to exercise their authority in compliance with statutes to include the constitutional obligation to administer their departments, whether personally, collectively, or through delegated authority, in accordance with the requirements of sections 53 and 54 of the *Constitution Act, 1867*. While government policy documents refer to the legal basis of ministerial responsibility, this foundation is often obscured by references to its conventional or political content. It would be going too far to suggest that the conventional and political can be neatly separated from the legal in each and every case. Nonetheless, it is possible to argue that even the most broadly defined grant of discretion still includes the non-discretionary obligation to account. The obligation to account is grounded in the Constitution. The obligation to require an account is also grounded in the Constitution.

It is true that the law can be used to compel executive accountability as well as to protect those public servants who challenge the truth of the Government's account. However, court orders, applications for judicial review, and criminal prosecutions are neither the most effective nor the most efficient means of holding the executive to account, although all must be available for use in those cases where there are grounds to believe that the executive has breached its legal obligations. The goal of ensuring accountability is best pursued through clearly written statutes, regulations and guidelines that set out the legal basis of the obligations of public servants because it is the legal foundation of their authority that distinguishes them from actors in the private sector.

Endnotes

---

[1] The relationship is captured in the well-known phrase from the Preamble to the *Constitution Act, 1867*, where it is stated that Canada is to have "a constitution similar in principle to that of the United Kingdom."

[2] Walter Bagehot, *The English Constitution*, p. 11.

[3] Brian Harrison, *The Transformation of British Politics, 1860-1995*, p. 44.

[4] By clearly stating that "the Constitution of Canada is the supreme law of Canada," section 52 of the *Constitution Act, 1982*, made explicit the consequence of having a written constitution, a consequence that had been implicit since 1867.

[5] It is a matter of some significance that in its first Charter decision, *Law Society of Upper Canada v. Skapinker*, [1984] 1 SCR 357, the Supreme Court cited *Marbury v. Madison* (1803), 5 U.S. (1 Cranch), the well-known United States Supreme Court judgment in which it was argued that judicial review of legislation was a consequence of a written constitution.

[6] *Thorson v. Attorney General of Canada*, [1975] 1 SCR 138 at 151.

[7] [1985] 2 SCR 455 at para. 39.

[8] [1991] 2 SCR 525 at 547.

[9] [1999] 3 SCR 199 at para. 54, Major J., for the Court.

[10] Quoted in Sir Stephen Sedley, "The Constitution in the Twenty-First Century," in Rt Hon Lord Nolan and Sir Stephen Sedley, *The Making and Remaking of the British Constitution*, p. 82.

[11] Sedley, "The Constitution," pp. 83-84.

[12] *Responsibility in the Constitution*, http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=constitution/ch01_e.htm.

[13] A.V. Dicey, *Introduction to the Law of the Constitution*, p. 325.

[14] The Government of Canada clearly recognizes that "ministerial responsibility in Canada, within the British Parliamentary system, is based on ministers' individual and collective responsibility to Parliament." Mr. Sylvain Lussier, Oral Submission of the Attorney General of Canada, June 17, 2005, p. 25664, lines 16-18.

[15] *Responsibility in the Constitution*.

[16] In Nolan and Sedley, *The Making and Remaking of the British Constitution*, p. 106.

[17] Eugene A. Forsey, "The Courts and the Conventions of the Constitution," p. 12.

[18] Ibid.

[19] Adams argued that the earlier form of ministerial responsibility held the monarch to account through the ministers as a means of subjecting the Crown to the rule of law. The later, modern form subjected the ministers and the Crown to the new sovereign, the Parliament. George Burton Adams, *Magna Carta and the Responsible Ministry*, p. 760.

[20] The Government Legal Services Branch in the United Kingdom publishes "A Guide to Judicial Review for UK Government Administrators," entitled *The Judge over Your Shoulder*. The purpose of the guide is "to give administrators at all levels an introduction to the present state of the law and to highlight the principles of good administration which the courts will expect us to apply."

[21] Adam Tomkins, *Public Law*, pp. 33-34.

[22] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 247-48.

[23] *Edwards v. Attorney General for Canada*, [1929] All ER Rep. 571 at 577.

[24] *Constitution Act, 1867* (UK) 30 & 31 Vict., c. 3.

[25] *Eurig Estate (Re)*, [1998] 2 SCR 565 at para. 34, Major J. Justice Major's interpretation of section 53 has been upheld by unanimous courts in two subsequent judgments. See *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at para. 19, Gonthier J. ; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 SCR 470 at para. 71, Iacobucci J.

[26] The idea that section 53 merely operates to restrict rather than to require has been rejected by the courts.

[27] "That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." *Bill of Rights* of 1689 (Eng.), 1 William & Mary sections 2, c. 2.

[28] Section 53 is not the constitutional version of the provision from the *English Bill of Rights*. While it has been argued that the *English Bill of Rights* entered the Canadian Constitution through the wording of the Preamble, the courts have not uniformly endorsed this idea.

[29] *Reference re: Agricultural Products Marketing Act, 1970 (Canada)*, [1978] 2 SCR at 1229.

[30] *Reference re: Agricultural Products Marketing Act, 1970 (Canada)*, [1978] 2 SCR at 1227.

[31] [1991] 2 SCR 525 at 547.

[32] In practice, compliance with this principle takes different forms. For a recent discussion see Joan Small, "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle." It is important to bear in mind that this paper was written before the Court's decision in *Re Eurig Estate*.

[33] *Financial Administration Act*, RSC 1985, c. F—11.

[34] Royal Commission on Government Organisations, *Final Report* (Glassco Report); Royal Commission on Financial Management and Accountability, *Final Report* (Lambert Report).

[35] *Public Service Modernization Act*, 2003 c. 22.

[36] Ward, Norman, *The Public Purse: A Study in Canadian Democracy*, p. 282.

[37] Ward, *Public Purse*, pp. 212-13.

[38] The authors were commenting on testimony by R.B. Bryce before the Public Accounts Committee. Bryce had commented that the act would "increase" or "clarify" the powers of Treasury Board. In the context, the authors' choice of the term "clarify" is clearly intended to support their view that the powers of Treasury Board had already been substantially increased by developments that took place before the passing of the Act. Hodgetts et al., *The Biography of an Institution*, p. 226.

[39] Ward, *Public Purse*, pp. 211-12.

[40] This problem is not unique to Canada. As Vernon Bogdanor has noted with regard to the Government of the United Kingdom "the doctrine of centralized government (has been) espoused by every administration since the (Second World) war." Vernon Bogdanor, *Politics and the Constitution: Essays on British Government*, p. 43.

[41] Both earlier versions of the Act had four schedules, although their names differed. In the 1951 version, Schedules A to D were headed Departments, Department (Corporation), Agency Corporations, and Proprietary Corporations, respectively. The 1984 Act included Schedules I to III with two parts to Schedule III. These were headed Departments, Departmental Corporations, Crown Corporations (Part I) and Crown Corporations (Part II).

[42] The "core public administration" comprises the executive branch of government in the narrowest, some might say truest, sense of the term. According to Lord Nolan, for example, the narrow definition of the Crown "holds that the executive is simply the Crown, represented by practical purposes by ministers of the Crown, and their servants, the civil service." *The Making and Remaking of the British Constitution*, p. 34.

[43] The *Public Service Modernization Act* replaced the expressions "public service of Canada" and "Public Service" by the expressions "federal public administration" and "public service," respectively. These changes "are to be considered as terminology changes only and are not to be held to operate as new law." *Public Service Modernization Act*, 2003 c. 22, s. 226.

[44] Substantial amendments to this part of the Act took effect on April 1, 2005. The significance of these amendments will be considered later in this paper.

[45] This fact also creates the possibility of multiple proceedings being initiated against the same individual. For a discussion of this problem in a different, although in many ways formally similar, context see: Caroline Murdoch and Joan Brockman, "Who's on First? Disciplinary Proceedings by Self-Regulating Professions and other Agencies for 'Criminal' Behaviour."

[46] Gerald E. Caiden, "The Problem of Ensuring the Public Accountability of Public Officials," in *Public Service Accountability: A Comparative Perspective*, p. 25.

[47] Richard Mulgan, "'Accountability': An Ever-Expanding Concept," p. 555.

[48] Barbara S. Romzek and Melvin J. Dubnick, "Accountability in the Public Sector: Lessons from the Challenger Tragedy."

[49] Ezekiel J. Emanuel and Linda L. Emanuel, "What Is Accountability in Health Care?"

[50] In *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, which involved an attempt by the Auditor General to gain access to documents protected under the claim of Cabinet confidentiality, the Supreme Court refused to expand the statutory powers of the Auditor General beyond those that were explicitly granted in the *Auditor General Act*. Writing for Court, Chief Justice Dickson noted that "[t]he appropriateness of an enlarged mandate for the Auditor General is for Parliament, not the courts, to decide," p. 109.

[51] *Roncarelli v. Duplessis*, [1959] SCR 121 at 142; *Reference re Manitoba Language Rights*, [1985] 1 SCR, 721 at 748; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] SCC 49 at para. 57.

[52] Justice Rand's oft-quoted remark that "in public regulation of this sort there is no such thing as absolute or untrammelled 'discretion'" was made in reference to the actions of then Premier and Attorney General of Quebec, Maurice Duplessis. *Roncarelli v. Duplessis*, [1959] SCR 121 at 140.

[53] *Results for Canadians A Management Framework for the Government of Canada.*

[54] *Results for Canadians: A Management Framework for the Government of Canada*, p. 16.

[55] Although it is common to note that the Nuremberg principle, following orders is never a defence to legal liability, applies to this relationship, in practice it is often difficult for an employee to distinguish between a superior's legitimate exercise of discretion and an illegal act. In other words, one must not only know the legal boundaries of one's own office, one must be aware of the boundaries of the offices of those with authority over one. This reservation does not apply, of course, to the types of egregious violations that were the subject of the original Nuremberg trials.

[56] This is, of course, the domain of the whistle-blower, a subject that lies outside the present study.

[57] Under s. 64 the Public Accounts submitted each year to the House of Commons must "include the opinion of the Auditor General."

[58] I use the word "ideological" here to draw attention to the seemingly obvious, but sometimes overlooked in our post-ideological age, fact that political parties in Canada are ideologically diverse and that their platforms and policy agendas reflect ideological differences.

[59] Commission of Inquiry into the Sponsorship Program and Advertising Activities, Transcripts vol. 62 (January 25, 2005), pp. 10881-10882.

[60] *Governing Responsibly: A Guide for Ministers and Ministers of State.*

[61] *Governing Responsibly*, pp. 1-2.

[62] *Governing Responsibly*, p. 2.

[63] *Governing Responsibly*, p. 3.

[64] *Review of the Responsabilities and Accountabilities of Ministers and Senior Officials*, p. 4.

[65] *Management in the Government of Canada: A Commitment to Continuous Improvement*, p. 9.

[66] *Management in the Government of Canada*, p. 9.

[67] *Management in the Government of Canada*, pp. 9-10.

[68] *Guidance for Deputy Ministers*, http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=gdm-gsm/gdm-gsm_doc_e.htm.

[69] *Guidance for Deputy Ministers.*

[70] "A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. One of the most important of those restraints is to exercise caution when it comes to making criticisms of the government." *Fraser v. Canada (Public Service Staff Relations Board)*, at para. 43.

[71] "As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time." *Fraser*, at para. 41.

[72] *Reference re: Alberta Legislation*, [1938] SCR 100.

[73] *Management in the Government of Canada*, p. 7.

[74] *The* Financial Administration Act: *Responding to Non-Compliance*, p. 9.

[75] *The* Financial Administration Act: *Responding to Non-Compliance*, p. 9.

[76] *Management in the Government of Canada*, p. 3.

[77] Ronald C. Moe and Robert S. Gilmour, "Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law," p. 138.

[78] Moe and Gilmore, "Rediscovering Principles of Public Administration."

[79] Mulgan, "Accountability," p. 564.

[80] For example, a compliance model may be directed towards reducing systemic sources of problems without seeking to assign liability to any particular individual, while a deterrence system may be more concerned with identifying and blaming named individuals. It could be argued that a Commission of Inquiry, such as the present one, fits the compliance model while the civil and criminal actions against individuals alleged to have engaged in wrongdoing fit the deterrence model.

[81] Reiss, *Enforcing Regulation*, p. 25.

[82] David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector.*

[83] To cite one example, Kieran Walshe, in "The Rise of Regulation in the NHS," has shown that during a time of government cutbacks the number of regulatory bodies in the National Health Service in the United Kingdom actually increased dramatically.

[84] Christopher Hood et al., *Regulation inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*, p. 8.

[85] Hood et al., *Regulation inside Government*, 71. The phrase has also been applied to the Canadian civil service. For a recent example, see Donald J. Savoie, *Breaking the Bargain: Public Servants, Ministers, and Parliament*, pp. 207-208.

[86] Hood et al., *Regulation inside Government*, p. 72.

[87] In a memorandum submitted to the Standing Committee on Public Administration of the UK Parliament in January 1999, N.D. Lewis drew attention to the need in the United Kingdom for a statute similar to the *Administrative Procedure Act* in the United States. While the American statute is much broader in scope than the *Financial Administration Act*, it is concerned with the problem of accountability. http://www.publications.parliament.uk/pa/cm199899/cmselect/cmpubadm/209/209m113

[88] *Criminal Code*, RSC 1985, c. C-46, ss. 119-22.

[89] It is reasonable to assume that by "that provision" Mr. Goodale was referring to section 11(2)(f) of the Act, as it was worded prior to April 1, 2005, because Part IX of the Act, entitled "Civil Liability and Offences," has nothing to do with matters of discipline. Commission of Inquiry into the Sponsorship Program and Advertising Activities, Transcripts vol. 128 (May 27, 2005), pp. 24116-24117 (OE).

[90] *The* Financial Administration Act: *Responding to Non-compliance*, p. 49.

[91] *Guidelines for Discipline*, Effective April 1, 2005.

[92] *Guidelines for Discipline*, Archived Version.

Bibliography

Books and Articles

Adams, George Burton. "Magna Carta and the Responsible Ministry." *American Historical Review*, 20(4) (July 1915): 744-60.

Bagehot, Walter. *The English Constitution*. 1867; Oxford: OUP, 2001.

Bakvis, Herman. "Prime Minister and Cabinet in Canada: An Autocracy in Need of Reform." *Journal of Canadian Studies*, 35(4) (Winter 2001): 60-79.

Bogdanor, Vernon. *Politics and the Constitution: Essays on British Government*. Aldershot: Dartmouth, 1996.

Butler, David, Vernon Bogdanor, Robert Summers, eds. *The Law, Politics, and the Constitution*. Oxford: Oxford University Press, 1999.

Caiden, Gerald E. "The Problem of Ensuring the Public Accountability of Public Officials," pp. 17-38. In Joseph G. Jabbra and O.P. Dwivedi, eds., *Public Service Accountability: A Comparative Perspective*. West Hartford: Kumerian, 1988.

Day, Patricia, and Rudolf Klein. *Accountabilities: Five Public Services*. London: Tavistock, 1987.

Deutsch, John J. "Parliament and the Civil Service." *Queen's Quarterly*, 43 (1957): 565-73.

Dwivedi, O.P."The Issue of Accountability in the Public Service of Canada." In Joseph G. Jabbra and O.P. Dwivedi, eds., *Public Service Accountability: A Comparative Perspective*. West Hartford: Kumerian, 1988.

Emanuel, Ezekiel J., and Linda L. Emanuel. "What Is Accountability in Health Care?" *Annals of Internal Medicine*, 124 (1966): 229-39.

Flinders, Matthew. *The Politics of Accountability in the Modern State*. Aldershot: Ashgate, 2001.

Forsey, Eugene. "The Courts and the Conventions of the Constitution." *University of New Brunswick Law Journal*, 11 (1984): 11-42.

Franks, C.E.S. "Not Anonymous: Ministerial Responsibility and the British Accounting Officers." *Canadian Public Administration*, 40(4) (Winter 1979): 633.

Gagne, R.L. "Accountability and Public Administration." *Canadian Public Administration*, 39(2) (Summer): 213-25.

Galligan, D.J. *Discretionary Powers: A Legal Study of Official Discretion*. Oxford: Clarendon, 1986.

Harrison, Brian, *The Transformation of British Politics, 1860-1995*. Oxford: OUP, 1996.

Hartle, Douglas G. "The Report of the Royal Commission on Financial Management and Accountability (The Lambert Report)." *Canadian Public Policy*, V.3 (1979): 366-82.

Hawkins, Keith, and John M. Thomas. "The Enforcement Process in Regulatory Bureaucracies." In Hawkins and Thomas, *Enforcing Regulation*.

Hawkins, Keith, and John M. Thomas, eds. *Enforcing Regulation*. The Hague: Kluwer-Nijhoff, 1984.

Hawkins, Keith, and John M. Thomas, eds. *Making Regulatory Policy*. Pittsburgh: University of Pittsburgh Press, 1989.

Hawkins, Keith, and John M. Thomas. "Rule Making and Discretion: Implications for Designing Regulatory Policy," pp. 263-80. In Hawkins and Thomas, *Making Regulatory Policy*.

Hicks, Michael. "The Treasury Board of Canada and Its Clients: Five Years of Change and Administrative Reform, 1966-71." *Canadian Public Administration*. 16(2) (Summer 1973): 182.

Hodgetts, J.E., and William McCloskey, Reginald Whitaker, V. Seymour Wilson. *The Biography of an Institution: The Civil Service Commission of Canada, 1908—1967*. Montreal: McGill-Queen's University Press, 1972.

Hood, Christopher, et. al. *Regulation inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*. Oxford: Oxford University Press, 1999.

Hood, Christopher, and Colin Scott. "Bureaucratic Regulation and New Public Management in the United Kingdom: Mirror-Image Developments?" *Journal of Law and Society*, 23 (1966): 321-45.

Jabbra, Joseph G., and O.P. Dwivedi, eds. *Public Service Accountability: A Comparative Perspective*. West Hartford: Kumerian, 1988.

Johnson, A.W. "The Treasury Board of Canada and the Machinery of Government of the 1970s." *Canadian Journal of Political Science*. 4(3) (September 1971): 346.

Kernaghan, Kenneth. "Power, Parliament and Public Servants in Canada: Ministerial Responsibility Reexamined." *Canadian Public Policy*, V.3 (1979): 383-96.

Marshall, Geoffrey. *Constitutional Conventions*. Oxford: Clarendon, 1984.

Marshall, Geoffrey, ed. *Ministerial Responsibility*. Oxford: Oxford University Press, 1989.

Moe, Ronald C., and Robert S. Gilmour. "Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law." *Public Administration Review*, 55(2) (March 1995): 135-46.

Mulgan, Richard. "'Accountability': An Ever-Expanding Concept." *Public Administration*, 78(3) (2000): 555-73.

Murdoch, Caroline, and Joan Brockman. "Who's on First? Disciplinary Proceedings by Self-Regulating Professions and Other Agencies for 'Criminal' Behaviour." *Saskatchewan Law Review*, 64 (2001): 29-56.

Nolan, Rt Hon Lord, and Sir Stephen Sedley. *The Making and Remaking of the British Constitution*. London: Blackstone Press, 1997.

Osborne, David, and Ted Gaebler. *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector*. Penguin: New York, 1993.

Peters, B. Guy, and Donald J. Savoie. *Taking Stock: Assessing Public Sector Reforms*. Montreal & Kingston: McGill-Queen's University Press, 1998.

Power, Michael. *The Audit Society: Rituals of Verification*. Oxford: Oxford University Press, 1997.

Reiss, Albert J., Jr. "Selecting Strategies of Social Control over Organizational Life." In Hawkins and Thomas, *Enforcing Regulation*, 23-35.

Romzek, Barbara S., and Melvin J. Dubnick. "Accountability in the Public Sector: Lessons from the Challenger Tragedy." *Public Administration Review* (May/June 1987): 227-38.

Savoie, Donald J. *Breaking the Bargain: Public Servants, Ministers, and Parliament*. Toronto: University of Toronto Press, 2003.

Savoie, Donald J. *Governing from the Centre: The Concentration of Power in Canadian Politics*. Toronto: University of Toronto Press, 1999.

Scott, Colin. "Accountability in the Regulatory State." *Journal of Law and Society*, 27(1) (2000): pp. 38-60.

Small, Joan. "Money Bills and the Use of the Royal Recommendation in Canada: Practice versus Principle." *Ottawa Law Review*, 27 (1995-1996): 33-58.

Smith, David E. *The Invisible Crown: The First Principle of Canadian Government*. Toronto: University of Toronto Press, 1995.

Sossin, Lorne, and Charles W. Smith. "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government." *Alberta Law Review*, 40 (2003): 867-93.

Stone, Bruce. "Administrative Accountability in the 'Westminster' Democracies: Towards a New Conceptual Framework." *Governance*, 8(4) (1995): 505-26.

Sutherland, Sharon. "Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem." *Canadian Journal of Political Science* 24(1) (March 1991): 91-120.

Tomkins, Adam. *Public Law*. Oxford: Oxford University Press, 2003.

Tupper, Allan. "The Contested Terrain of Canadian Public Administration in Canada's Third Century." *Journal of Canadian Studies*, 35(4) (Winter 2001): 142-60.

Veilleux, Gerard, and Donald J. Savoie. "Kafka's Castle: The Treasury Board of Canada Revisited." *Canadian Public Administration*. 31(4) (Winter 1998): 517-38.

Walshe, Kieran. "The Rise of Regulation in the NHS." *BMJ*, 324 (April 20, 2002): 967-70.

Ward, Norman. *The Public Purse: A Study in Canadian Democracy.* Toronto: University of Toronto Press, 1962.

White, W.L., and J.C. Strick. *Policy, Politics, and the Treasury Board in Canadian Government.* Don Mills: Science Research Associates, 1970.

Woodhouse, Diana. *In Pursuit of Good Administration: Ministers, Civil Servants, and Judges.* Oxford: Clarendon, 1997.

Woodhouse, Diana. "The Reconstruction of Constitutional Accountabilty." *Public Law* [2002] Spring: 73 — 90.

Wright, J. David. "Exposing the chameleon: Response to 'Accountability and Public Administration.'" *Canadian Public Administration*, 39(2) (Summer): 226 — 34.

Government Documents

Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform. Privy Council Office. February 2004.

The Financial Administration Act: *Responding to Non-compliance, A Report to Parliament*. Treasury Board Secretariat. October 2005.

Governance in the Public Service of Canada: Ministerial and Deputy Ministerial Accountability. Report of the Standing Committee on Public Accounts. May 2005.

Governing Responsibly: A Guide for Ministers and Ministers of State. Privy Council Office. 2003.

Guidelines for Discipline. Treasury Board of Canada Secretariat. 2005.

Guidelines for Discipline — Archived Version. Treasury Board of Canada Secretariat. 2003.

Management in the Government of Canada: A Commitment to Continuous Improvement. A Discussion Paper Submitted by the President of Treasury Board. October 2005.

Modernizing Accountability Practices in the Public Sector. A Joint Paper by the Office of the Auditor General of Canada and the Treasury Board Secretariat.

The Parliament We Want: Parliamentarians' Views on Parliamentary Reform. Library of Parliament. December 2003.

Responsibility in the Constitution. Minister of Supply and Services Canada. 1993. Reissue of 1977 submission by the Privy Council Office to the Lambert Commission.

Results for Canadians: A Management Framework for the Government of Canada. Treasury Board of Canada Secretariat. March 30, 2000.

Review of the Responsabilities and Accountabilities of Ministers and Senior Officials. A Report to Parliament. Treasury Board Secretariat. October 2005.

Royal Commission on Financial Management and Accountability. *Final Report*. Ottawa: Minister of Supply and Services, 1979. (Lambert Report.)

Royal Commission on Government Organisations. *Final Report*. Ottawa: Queen's Printer, 1962. (Glassco Report.)

Cases

British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49.

Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources), [1989] 2 SCR 49.

Edwards v. Attorney General for Canada, [1929] All ER 571.

Eurig Estate (Re), [1998] 2 SCR 565.

Law Society of Upper Canada v. Skapinker, [1984] 1 SCR 357.

Marbury v. Madison (1803), 5 U.S. (1 Cranch).

Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General), [2001] 1 SCR 470.

Thorson v. Attorney General of Canada, [1975] 1 SCR 138.

Reference re Alberta Legislation, [1938] SCR 100.

Reference Re Canada Assistance Plan, [1991] 2 SCR 525.

Reference re Manitoba Language Rights, [1985] 1 SCR 721.

Reference re Secession of Quebec, [1998] 2 SCR 217.

Roncarelli v. Duplessis, [1959] SCR 121.

Wells v. Newfoundland, [1999] 3 SCR 199.

Westbank First Nation v. British Columbia Hydro and Power Authority, [1999] 3 SCR 134.

PUBLIC ACCOUNTABILITY OF AUTONOMOUS PUBLIC ORGANIZATIONS

B. Guy Peters

1 Introduction

The accountability of public organizations has become an increasingly complex issue for contemporary governments. The traditional parliamentary model of accountability that presumed a linear and hierarchical relationship between a public organization, a Minister and Parliament has decreasing relevance for the manner in which public services are actually delivered at the beginning of the 21st century. The need to reconsider accountability is apparent even for organizations that are components of "mainstream government." Ministers have become less willing to accept full responsibility for the actions of their organizations, especially implementation decisions made at lower levels of those organizations, and the logic of government reforms has been that those lower level officials should have more latitude for making decisions and be more accountable for their actions. Further, given that a smaller percentage of public services are now delivered directly by ministerial departments, a re-examination of accountability is called for if the public sector is to slow, and perhaps even reverse, the public's loss of confidence.

Several changes in politics and public administration are driving changes in accountability. First, accountability as a form of democracy is increasingly important because of the decline of other forms of democracy. Participation in elections and membership in political parties have been declining steadily over the past several decades, and citizens appear to have lost much of their faith in the input institutions of democracy (Pharr and Putnam, 2000; Nye, King and Zelikow, 2000), such as voting. Thinking about democracy, by both political leaders and scholars, has shifted to some extent towards "output legitimation," emphasizing the role of policy and administration in building the foundations of a legitimate state. In that setting, accountability, as well as the ability of citizens to participate in controlling organizations that deliver their services, becomes crucial to democratic politics.

Public sector reforms also have emphasized participation by clients, and by the public in general, in the decisions of public organizations, so that accountability now is being exercised downward as well as upward. In some instances, the ability of clientele to exert influence over, and demand accountability from, public organizations has been formalized through advice and consultation institutions, while in other instances the relationships with the stakeholders are more informal and subtle. In all these relationships among clientele and service providers, however, it is clear that the public expects direct accountability from public organizations, and that representative institutions no longer are considered sufficient means of control.

Further, public organizations must find ways to deal effectively with other organizations in their environment that are necessary for the success of their programs. Very few, if any, public sector organizations can now deliver services effectively without cooperating with other organizations, public or private. Even if they could ignore other actors in their policy-making environment, public organizations would probably be ill-advised to consider acting as a "single, lonely organization" and not attempt to work cooperatively with programs and organizations that can make their program more effective (Peters, forthcoming). Thus, public organizations must now respond to pressures coming from a range of political and social actors, and some of those pressures may conflict with traditional forms of control coming from ministers and Parliament. In particular, coordination may diffuse both financial and programmatic lines of control and make it difficult for traditional accountability organizations to assign responsibility for actions.

The complexity involved in delivering contemporary public services now also affects accountability because of the problem of "many hands" (Mulgan, 2000). The long chains of action involved in delivering services, and the number of actors involved in them, makes it difficult to identify the source of any administrative or policy failure, should one occur. As well, the capacity to track the utilization of public money involved in contracts, coordinated service delivery systems and partnership arrangements makes it more difficult to maintain fiscal accountability. Further, and central to the concerns of this paper, contracting powers granted without close supervision by Parliament, a Minister, or a board of directors may also make maintaining substantive accountability for policy decisions more difficult. These problems, arising from the involvement of multiple actors in the delivery of services, occur as policies are formulated and as the purposes for which contracts and other instruments of governing are being devised, as well as when the programs are being implemented with the contracts or cooperative mechanisms. Much of the focus on accountability of policy instruments such as contracts has been placed on implementation, but greater concern needs to be raised about the purposes for which these instruments are used and the content of the policy that is being implemented.

Although the above-mentioned changes in patterns of governance are relevant, the most significant change affecting accountability in the public sector has been the increasing use of autonomous and quasi-autonomous organizations to deliver public services. A dominant pattern of reform in the public sector has been the creation of "agencies" to deliver public service (Pollitt, Talbot, Caulfield and Smullen, 2004). The Organization for Economic Cooperation and Development (2002) referred to these structures as "Distributed Public Governance," meaning that tasks that once were housed within Cabinet departments have now been widely dispersed. The public sector has as a consequence become more complex organizationally, with a large number of structures responsible for individual segments of policy, each having varying degrees of connection to public authority. A central justification motivating these reforms has been to separate policy-making and administration, with the presumption that greater managerial freedom would enhance the efficiency of the organizations (see Polidano, 1999).

The slogan "let the managers manage" is used to justify the increasing power of managers in making decisions within the public sector and consequent weakening of the hierarchical control of ministers over the activities for which they are nominally responsible. The argument in favour of creating agencies and analogous organizations has also been to some degree accountability, at least financial accountability. When a program is located within a larger department, it may be difficult for Parliament or auditors to assess the real costs for that program (see Niskanen, 1971), because of cross-subsidization and shared overheads. Having each organization as a "tub on its own bottom" makes tracking costs and financial accountability more feasible, although the separation from direct ministerial authority may limit the mechanisms for enforcing accountability.

Although separating ministries into numerous separate organizations providing a single service may have improved one aspect of accountability, it appears to have had a negative impact on other aspects. In addition to the complexities identified already, the problem of coordination and the linking of services has been exacerbated by the development of the dispersed model of service delivery. Coordination and coherence have always been difficult in the public sector, but disaggregating ministries has only increased the problems (Mountfield, 2001). In accountability terms, the diffusion of responsibility for programs makes it difficult to trace authority and financial flows when managers attempt to overcome the internal divisions of government. Further, to reach its governance potential, the public sector must develop more coherent policy goals and integrated visions of the future; having multiple poorly coordinated organizations only increases the difficulty in governing in a coherent manner.

To some extent, the use of these autonomous organizations is not new in the public sector, and analogous organizations have been used in the past. The logic of the contemporary changes is not dissimilar to that frequently used to justify the creation of agencies, public corporations, "quangos," and a host of other organizations. Even from the initial use of these formats, there have been significant concerns (Smith and Hague, 1971) about the ability of conventional public sector processes to maintain acceptable levels of control over the processes and performance of those organizations. All of these formats involve organizations operating at arm's length from government and therefore having greater latitude for action; as a result, they also present accountability problems.

Most problems of accountability for autonomous organizations have been assumed to be rather familiar ones of "shirking" responsibilities in order to retain budget funds, or perhaps pursuing their own policy interests. The issues at the root of this Commission's investigation are different, and seemingly more difficult for governments to cope with in the case of organizations such as Crown corporations. The problem encountered in this Inquiry has been an extreme case of "moral hazard" in which the agent pursues its own interests (in this case, contracts that are clearly outside the bounds of propriety) rather than the goals of the principal. When autonomous or quasi-autonomous organizations are granted the latitude to make operational, and even strategic, decisions with minimal external supervision, the possibility for actions of this sort will always exist, and so accountability becomes an issue of ensuring conformity to the core policy and administrative values in the public sector, while still maintaining the autonomy considered necessary for efficiency.

2 Ideas About Accountability

To this point, the discussion has dealt with accountability as if the meaning of the term were agreed upon. In fact, the term accountability is used in at least four ways, each with rather different implications for public administration (Thomas, 2003). We should understand the differences among these concepts and be more careful when discussing accountability, both in academic and practical discourse. Indeed, if one conception of accountability is stressed, then performance on the other dimensions may be undermined. In addition to distinctions among the four versions of accountability, it is important to differentiate accountability from other controls over public organizations, and especially differentiate *ex ante* controls used to shape behaviour from accountability that tends to be largely *ex post*. In general governments have been shifting from *ex ante* to *ex post* controls, allowing greater latitude for organizational leaders, especially for organizations such as the Crown corporations designed to have greater latitude for action, but which must still be held accountable for their actions.

2.1

Answerability

The simplest concept of accountability is "answerability," or the notion that all an organization must do to satisfy its obligations is to answer for its actions. This obligation may be met simply by issuing an annual report, or making a statement to a legislative committee. If the statement is complete and truthful, then the obligation is discharged. The operational factor is transparency, and fear of public exposure of malfeasance may be sufficient to produce appropriate behaviour. This minimalist form of control, or lack thereof, is most commonly used for organizations that either operate primarily in the market or have relatively little public money, as is true for some Crown corporations. Answerability also is appropriate for organizations that are controlled primarily through competitive or mutuality pressures (Hood et al., 2004). Universities, for example, are controlled through peer review and competition for research money and for students, and hence have a relatively light accountability regimen. Further, organizations such as research laboratories and again universities that rely on expertise are generally more capable of escaping direct controls and stringent accountability.

2.2

Accountability

Accountability *per se* takes answerability one step further and demands that the individuals or organizations in question not only render an account of action, but that they be judged by some independent body on that action. In particular, accountability has come to mean that the public bureaucracy reports to a political organization, generally the legislature, and that it and the political officials in charge of the organization are scrutinized on their exercise of the public trust. That scrutiny also involves the possibility of sanctions being imposed on the managers or on the organization as a whole. In Westminster systems, the tradition has been that individual public servants would not be held to account in such a manner, although that practice is changing.

As noted, however, the conduct of public organizations is now scrutinized by numerous actors in addition to the legislature, and even the legislature itself has been tending to utilize more instruments to exercise its oversight. For example, auditing organizations serving the legislative branch have been invigorated and have added substantial capacity in performance auditing as well as conventional financial auditing. There also has been a proliferation of inspectorates responsible for supervising particular organizations or areas of public policy, with power to sanction as well as simply exposing malfeasance (Power, 1997; Hood et al., 1999). For legislatures, the principal mechanism involved in producing compliance is hierarchy and the associated authority. Bureaucratic organizations, as agents of these legislative organizations, are mandated by law to perform certain acts and are constrained by rules of procedure. The actors involved in oversight therefore have legal standards against which to compare performance; they also have the legal resources to attempt to enforce conformity with the standards.

2.3
Responsibility

The term "responsibility" is also often used synonymously with accountability, but its meaning should be differentiated. While accountability is based upon a hierarchical and external relationship, responsibility involves a more inward source of control being exercised over the actions of public servants (see Bovens, 1998). The individual public servant is expected to remain responsible to his or her own conception of the law being administered, as well as to an internalized set of values.[1] In this view, the public servant must exercise some personal judgment about appropriate behaviour and may be called upon to make an independent assessment of the legality of the actions that she or he is being mandated to undertake by the Minister.

This difference in standards of behaviour in the public service raises the difficult question of whether the public servant, and the public organization, is indeed the servant of the Minister or the servant of the public. The answer to that question in most traditional models of accountability is clearly that the public servant is primarily, or even totally, the servant of the Minister. To the extent that there are judgments made about the public good, those judgments are to be made by the Minister, and a "willing suspension of judgment" may be enshrined in formal statements of constitutional principles.[2] That having been said, however, both changes in the ethos of public servants as members of society and the increased transparency of most political systems have made maintaining internal control over public servants less viable than in the past.

The changes in Government resulting from the New Public Management have attenuated the links between the Minister and the public servant (Pollitt and Bouckaert, 2004). Civil servants may have been more willing to accept the control of their Minister so long as they were in a career structure separated from the outside and the two sets of actors were closely dependent upon one another. As managerial positions in the public sector have been opened to outside competition, senior public managers may no longer share the values of their ministers, or of their colleagues who have spent an entire career in government, and they therefore may be less committed, not only to obedience to their Minister, but also to the ethical principles that have been common within the public service in countries such as Canada.[3]

2.4
Responsiveness

Finally, the concept of responsiveness presents perhaps even more complex problems of control for the contemporary public sector. The opening of government and the spread of concepts such as citizen engagement in the industrialized democracies means that citizens feel that public services, and public servants, should be more responsive to them and to their demands. As well as responding to the demands of clients as individuals, public organizations are involved with networks of other public and private organizations, the now famous "stakeholders" in the policy process, that also require the public sector organization at the centre of the process to negotiate over both the formulation and implementation of its policy (Klijn, 1996; Sorenson and Torfing, 2003).

2.5

Conflicts Within Components of Accountability

These various components of accountability have the potential to operate differently, and may in practice be antithetical to one another. Perhaps most obviously, if the civil servant wishes to be responsive to his or her clients, then it may be more difficult to be strictly responsible to the laws being administered. The professional dilemma of the street level bureaucrat (Meyers and Vorsanger, 2003) often is which of those two dimensions of accountability should be pursued with the greater vigour. On the one hand, the civil servant may sincerely wish to serve the clientele to the greatest extent possible, and many civil servants bend the law to provide the best possible service, or the most desired outcomes, for their clients. On the other hand, however, he or she knows that there is a legal mandate that must be pursued, and for which he or she is indeed responsible.

One important potential conflict for civil servants in these various forms of control is between responsibility and ministerial accountability. Traditional notions of the role of the civil service, and of accountability, involve a certain amount of suspension of individual judgment by civil servants in favour of following ministerial direction. The defence of "an order is an order," however, is no longer sufficient, and civil servants are expected to be responsible to their own sense of the law and of ethics when administering the law. Few public service systems, however, have provided individuals with adequate means of coping with what they consider illegal or immoral directions from a superior, nor have they provided those individuals — the "whistleblowers" — adequate protections from subsequent persecution.

Further, individual public servants may believe that their primary accountability is to the public and to Parliament, rather than to the Minister. The difficulty in such a conception of accountability is that it is open to individual interpretation. Directions from the Minister should be clear, while the public interest is at best vague and perhaps unknowable in any definitive manner. The instructions and wishes of Parliament may be somewhat less obscure, but those wishes may be less immediate than those of a Minister. In autonomous organizations, such as Crown corporations, the multiple responsibilities of public employee may be even more difficult to untangle, given the existence of a board of directors, and the need to make the organization conform to market principles.

2.6

Accountability and Many Hands

When public organizations are operating within institutionalized networks of interests and must bargain with those interests, while being to some extent at least responsive to the wishes of those social partners, it may become difficult to maintain the sense of the public interest (Kearns, 2003). This difficulty in pursuing their own definition of the public interest may be especially apparent when the public servants are involved with other public and quasi-public organizations, all of whom may also claim to speak for the public as a whole. One of the major management and accountability issues for the contemporary public sector, therefore, appears to be balancing a sense of the public interest at a broad level with the particular responsibilities and demands of individual organizations.

The expansion of the number of actors involved in accountability also means that public servants and their organization may be pressured to account for their actions and to defend them from different directions. Most importantly, adequate performance for one of those actors may be malfeasance or nonfeasance for another. One rather egregious example of multiple accountabilities occurred in the recent tsunami disaster in Asia. Immediately after the tsunami struck the resorts in Thailand, it appeared that thousands of vacationing Swedes had been killed or injured. The government did not, however, respond immediately because some public servants (being responsible to law) said that there was no authorization to spend public money for the purpose of sending relief planes. Responsiveness to public demands quickly defeated that position (once ministers returned from the Christmas holidays), but at least 36 hours were lost.

The possible dilemma between responsiveness and responsibility was in fact expressed very well by the authors of the Treasury Board Secretariat's 2005 report on the Crown corporations. They raised the crucial question:

> How can the Government of Canada improve the effectiveness of the current governance framework so that the programs and services delivered by Crown Corporations respond to Canadians' interests and needs as well as meet Canadians' standards and expectations for ethical conduct and operation for all public institutions?

In other words, how can these organizations be at once responsive and responsible in the context of these requirements being imposed upon them?

The OECD's discussion of accountability of "distributed public governance" (Larkin, 2002) identifies three fundamental criteria for establishing proper accountability—external governance in the report—for the organizations created with greater autonomy from direct public control. These three criteria are:

- the roles in external governance of the various branches of government;
- a framework for external governance in terms of the direction, control and review of the operations of the organizations; and,
- specific provisions for each organization for its powers and operations.

Keeping those points in mind, I will now examine the report of the Treasury Board Secretariat, which addressed the question of the accountability and control of Crown corporations in Canada directly. Although organized more in a corporate format, these organizations are one of several forms of distributed public governance in Canada (another example being the Special Operating Agency), and the three criteria above can be applied to good effect in examining the management of Crown corporations.

3 The Crown Corporation

Although Canada did not follow the path of several other Westminster political systems and invest heavily in the "agency model" for organizing the public sector, it has had, and continues to have, its own version of the quasi-autonomous public organization — the Crown corporation. This means of providing important public services has a significant history within the Canadian public sector, beginning in the first quarter of the 20th century (Ashley and Smails, 1965). Initially, these organizations were, in essence, public corporations performing economic tasks, notably running the railways, but, over time, the format was extended to other areas of public activity, notably in the arts and in other activities that may be performed outside the mainstream of government responsibility and control.[3]

The distinction between those types of activities can be identified in part through the distinction made between Schedule III, Part 1, and

Schedule III, Part 2, Corporations. The latter organizations are engaged in more clearly public sector activities, and hence the form of accountability that is exercised over them (most proximately by the Auditor General) is somewhat akin to that exercised over other organizations within the public sector. That similarity to conventional forms of public accountability is less true for Part 1 Corporations. Part 1 Corporations are treated more like commercial enterprises, and therefore the forms of control are more like those one might expect for a private corporation, including a dividend plan and a plan for trading revenues. In addition, there are nine Crown corporations exempt from provisions of the Act that are subject only to their own individual constitutive legislation. These are primarily in the arts and in areas, such as broadcasting, that perhaps require even greater separation from government control in order to ensure objectivity.

Although the basic organizational format for the Crown corporation has been in place for some time, questions of accountability have been raised with greater urgency recently. The report from the Treasury Board Secretariat differentiated among several patterns of accountability and control for Crown corporations and made a number of recommendations for improving the relationships between political authority and these organizations. This report from the TBS will be assessed in this paper, followed by a more general discussion of patterns of control for devolved organizations of this type. I will look at the experience of several other countries, and particularly at their attempts to cope with the problem of accountability for agencies and analogous structures.

The report issued by the Treasury Board Secretariat identified some 46 Crown corporations existing in 2005. These corporations vary markedly in their employment levels, budgets, and purposes. They also appear to vary in the manner in which they are governed internally, and hence also in the formats available for enforcing accountability. The term "corporation" implies a certain pattern of management and governance, and, at least in terms of the formal existence of structures such as boards of directors, they do assume a corporate form. Further, many of the more important of these organizations, in terms of their employment and revenues, are self-financing and require little or no direct public funding. That fact provides these organizations greater autonomy and eliminates one of the most important of the mechanisms for parliamentary control—the budget.

The Treasury Board Secretariat report also identifies the extent to which some of these organizations deviate from what might be considered a common management and administration framework, and especially from the corporate framework for governance. These differences, in turn, raise the question of whether the single rubric of the Crown corporation is the best way to approach the perceived need of ministers and Parliament to separate some aspects of government from direct control by ministers. Most countries with agencies and similar devolved public bodies have adopted several different formats for these organizations, and those alternative formats perhaps better match the structure and operations of the organizations with the tasks for which they are responsible. For example, as Belgium has created any number of new agencies, they vary markedly in the extent to which they depend upon goals, direct connections with a sponsoring ministry, or consultative structures linking them with their stakeholders in their operating environments.[5]

The model for accountability of the Crown corporation expressed in the existing legislation, and in the report of the Treasury Board Secretariat, can only be said to be less than completely unambiguous. Peter Aucoin and Mark Jarvis (2005, p. 86) recognized this lack of clarity when they wrote:

> By creating a separate zone of executive authority for the administration of some aspects of public affairs in these agencies, Parliament has established a two-dimensional accountability regime.

The report calls very clearly for a clarification of these responsibilities, but the subsidiary recommendations do not appear to accomplish that important task. The model that is developed makes the management of these corporations responsible at once directly to the Minister and also to a board of directors. That board is itself also connected to the Minister, and is expected to be accountable to the Minister its collective "stewardship" of the corporation. The Minister, in turn, is answerable to Parliament for all the activities of the corporation, even the day-to-day operational decisions of management and lower-level employees. At the same time that these formalist arrangements are argued to be operative, the corporation is also meant to be a commercial enterprise, or in some cases a foundation, that is making its own decisions and functioning in a competitive environment.

The ambiguity of the accountability relationship in place for Crown corporations is expressed by the Treasury Board Secretariat's document when it states (p. 17):

> Ministers are not accountable for the day-to-day administration and operations of the corporation. However, they must answer to Parliament—that is, provide information and explanations, as appropriate—for all of the corporation's activities.

These two sentences taken together appear to place the Minister in a difficult situation. On the one hand, she or he appears to be expected to permit the management of the corporation a great deal of latitude in day-to-day management decisions. On the other hand, the Minister is expected to answer to Parliament and to the public for those decisions. Thus, the Minister may be in the awkward position of having to take responsibility for actions over which she or he had little or no operational control.

The apparent ambiguity of the Minister's situation with regard to Crown corporations has been identified in other countries that have been attempting to enforce ministerial forms of accountability on agencies and similar organizations. One of the clearest cases of these problems has been the United Kingdom, with the difficulties being typified by the case of Derek Lewis. Mr. Lewis was the chief executive of the HM Prison Service, an agency created as a part of the Next Steps reforms of the 1980s. Following several well-publicized prison breaks, Derek Lewis was fired. He then sued for unlawful dismissal, arguing that the Minister had meddled in the operations of the prisons and had prevented him (Lewis) from having the autonomy needed. The Minister argued that he could not afford to allow autonomy while being held to account in Parliament. Lewis won his case.

While the Minister may be in a difficult position when accountability is defined ambiguously, so too is the public manager (as was Mr. Lewis as noted above). The management arrangements for managers of Crown corporations makes those managers accountable to the Minister *and* to the board of directors. Even though the board is itself responsible to the Minister, the fact that it exists as a distinct entity from the ministry means that it must be expected to make some different decisions and to have different priorities. If so, then the chief executive of the corporation may well be receiving contrary directions and advice, and will have to exercise his or her own judgment about what directions to take the organization. While the presumed difference between the roles of the Minister and the board are those of policy and operations, again I would argue that in practice the two cannot be separated clearly, and therefore the manager is placed in a difficult position.

3.1
Mechanisms for Control

The ambiguous nature of accountability and control for the Crown corporation pervades other components of the discussion of the basic "vehicles" for policy guidance to the Crown corporation in the Treasury

Board Secretariat report. The three vehicles mentioned in the report (p. 17) are law, a corporate plan, and direct control. Of the three, law may be the least ambiguous, although some of the corporations are incorporated under a general Act that requires little specificity in control, and hence provides little real assistance to a manager (or Minister). Even the more specific legislation establishing particular Crown corporations give little more than general direction on goals and policy and even less on daily operations. To some extent, that is appropriate; it permits these organizations to evolve in response to changing conditions and demands, but still that minimal guidance may be of little help to managers or to boards. Clearer framework legislation, therefore, might well be one vehicle for clarifying to a board, and to officers of the Crown corporations, if a proposed contract or other action is *intra vires*, and therefore might be able to trigger scrutiny if inappropriate actions were proposed or undertaken.

The second instrument for control—the corporate plan—is developed at the initiation of the corporation itself and only reviewed by the Minister. Although the Minister has the opportunity to make suggestions and comments, the capacity for control is relatively weak compared to when an organization is under direct ministerial control. Without some means of formal influence over the corporate plan, it appears quite unlikely that the Minister can really influence the way in which the corporation operates. While the separation of quotidian concerns from corporate strategy and policy development reflects a general concern in the document to separate policy and administration, it does not follow that the separation will make for effective corporate management.

The third instrument for control of Crown corporations—the capacity to assume direct control of the organization—presumably will be exercised only when alternative forms of control fail. The use of that particular instrument, therefore, should be envisioned only in extreme cases, although perhaps there could be better specification of its appropriate use. That specification might at once enhance the autonomy of managers in the corporations and also ensure that Ministers (and Parliament) knew when more radical forms of intervention would be appropriate. Given the genesis of this review of the Crown corporations and their management, this more extreme form of intervention may appear more appropriate than in the past, but some criteria for invoking it may be needed to prevent its being used too freely for political rather than management reasons.

The ambiguous nature of control and accountability that appears inherent in the structure established for the Crown corporations raises the question of whether government policy-makers responsible for these organizations want them to be as autonomous as similar bodies found in other countries. This ambiguity about control may be in part because other types of organizations are filling the niche for the evolving agency model in Canada (see Fyfe and Fitzpatrick, 2002), and Crown corporations are left from earlier attempts at creating arm's length organizations that did not have as much autonomy. Further, most of the recent recommendations for reform of management of these corporations have been for a stronger ministerial hand in their management and especially in specifying their fundamental policy goals, indicating that there is little interest in greater autonomy.

The apparent desire to strengthen the role of the Minister points to the basic problem in all arrangements of this sort, as identified by many commentators on contemporary accountability (Polidano, 1999; Gregory, 1998). Executives in corporations, agencies and similar bodies believe they are empowered to manage those organizations, all the more so if the ethos of New Public Management is accepted widely in the public sector in question. At the same time, Ministers are held politically responsible for the actions of these organizations, and their overall direction. Although the distinction between strategy and operations can be made, it is inevitably blurred at the margins. Even if those margins could be defined clearly, however, Ministers might still not be willing to deny themselves attempts at intervention in operations, knowing that Parliament and other control organizations might not be willing to accept that distinction in the case of policy failure.[6]

At the same time that there appears to be an interest in strengthening the role of the Minister in accountability, the Treasury Board Secretariat report also calls for strengthening the role of the board of each corporation in management. That enhanced role for the board does conform to the presumed practice in the private sector and with many recent recommendations for improving corporate governance in the private sector.[7] It further conforms to the pattern of control in one of the longest running experiences with autonomous organizations (Sweden, see below) in the public sector. What this recommendation does not do, however, is to clarify the apparent ambiguity in the locus of accountability and control over management.

The report from the Treasury Board Secretariat places a great deal of reliance on the board of directors as a mechanism for control of the corporations, and those structures can certainly be important for oversight of management and operations. The report further calls for improving the procedures for vetting and appointing members of these boards. What does appear to be lacking, however, is a clear mechanism for holding the boards and their members accountable for performance of the corporations. The assumption appears to be that the boards will act responsibly and appropriately, but if that assumption is incorrect then there may be significant problems for the Minister and Parliament in exerting control. The recommendations for strengthening selection and training of board members certainly should help to improve the quality of the service of the board members, but some sense of the possibility, and rationale, for dismissal from the position should perhaps be considered.

The report from the Treasury Board also argued for minimizing the role of civil servants on the boards of Crown corporations. Given the concerns with accountability, this minimizing might be a retrograde step. Civil servants have been socialized into values of public responsibility and probity to a greater extent than the average outsider in the public sector. Further, they have knowledge of the limits of appropriate public action, and hence may be better able to advise managers on what their scope of action should be.

The most specific issue for what sort of guidance should come from the board, in terms of the work of this Commission, is contracting, and especially the possibility that contracts may be entered into by the executive of the Crown corporation that are "out of the ordinary or hold the potential for embarrassing the corporation." This issue appears to raise some familiar questions about accountability. The most obvious is that individuals will disagree about whether a particular contract meets those criteria, and hence an executive may in good faith chose not to consult about a contract that may go horribly wrong. Similarly, if the executive is not operating in good faith, then having a stipulation of this sort may not help. Some cases from the private sector, notably WorldCom and Enron, also indicate the need for a mechanism that can provide a board with the capacity for continuous and close supervision of executives, that capacity being balanced against the need of the executive for discretion and some managerial autonomy.

Examining the experience of other countries as they have attempted to deal with public contracting and accountability does not provide a great deal of assistance for considering the problems associated with contracting, especially in autonomous public bodies (see especially Schick, 1996, 24ff). In the cases examined, contracting appears to be a management prerogative in these organizations, with the results being reviewed largely after the fact. To the extent that there are *ex ante* controls over contracting, they tend to be procedural (bidding, publication of specifications, etc.) rather than over the purpose of the contract and whether that is an appropriate undertaking. There also tend to be numerous *ex post* controls, especially over the financial aspects of contracts and the specific performance of the contractor, but little more than routine controls over the purposes for which the contract was let originally.

The primary emphasis on controlling contracting authority in the public sector appears to be the familiar "principal agent" issue of ensuring that the individual or firm delivering the (product(for which the contract was let actually performs as intended. The assumption in most of the literature is that the contract itself is appropriate. The principal mechanism mentioned for controlling the way an executive uses contracts is the performance contract of that executive, with the assumption being that the primary failures of contracting would be in efficiency and fulfilling the mission of the organization, rather than a subversion of the contract device as a means of achieving other ends.

As part of the attempt to enhance control of the Crown corporations, the Treasury Board Secretariat has emphasized the need to enhance the transparency of the selection of members of their boards and to increase the involvement of stakeholders in the decisions of these organizations. Transparency is an important instrument for accountability and can be used in a variety of ways to enable external actors—whether members of other formal institutions or the public in general—to understand what is occurring in the organization, and some greater public visibility for the boards of these organizations is desirable.

Transparency concerning appointment of the leadership of the Crown corporations could certainly be a benefit to the accountability of these organizations, although even more extreme versions of transparency may be used to cope with the types of contracting problems at the centre of the current issues. Some countries, for example, South Korea and

Romania, that have had extreme problems with corruption in public procurement have put all contracts on a website, showing the specifications of the contract and all the bids (after the closing date). These systems were designed to prevent favouritism in granting the contracts, but the same principle could be extended to the content of the contracts; that is, if the content of the contracts had to be made public, managers would have to be more circumspect.[8] Similar openness is being fostered in other countries for public personnel issues.

3.2

Alternative Patterns of Governance and Accountability

As noted, the pattern of governance advocated for the Crown corporation in Canada represents an attempt at a compromise between direct ministerial control and a more autonomous style that utilizes boards to control the management of the organization, much as the board of directors might be expected to exercise control over the executives of a private corporation. This hybrid model is but one of a number of alternative structures for control of autonomous organizations that have been developed. Each of these represents an attempt to strike a balance between autonomy and control. Further, each of these governance structures represents a set of choices about which aspects of the behaviour of organizations control should be exercised over. For example, although almost all governance structures tend to maintain controls over spending public money, personnel and management decisions often are delegated to the executive of the organization.

3.2.1 The Swedish Model

When the British government undertook the Next Steps reform in the 1980s and thereby launched its interest in agencies and similar organizations, it believed it was copying the Swedish model of the agency or "board" (*styrelsen*). This model of policy administration has been in place for several centuries and was designed originally to limit the power of the monarch, and his Ministers, by giving an autonomous organization control over the implementation of policy, and hence most contacts with citizens. This model has persisted into the democratic era, with the ministries responsible for setting policy, but most implementation still done through these largely autonomous organizations.

There are several alternative models for organizing these autonomous agencies. In all the models, the central management figure in a Swedish agency is a director general, appointed by the government, often with the advice of the board. In some agencies, the director general is fully responsible for the actions of the organization, and answers to Parliament for his or her actions. In other cases, a board of some sort, generally thought of as being expert, and/or composed of worthy public figures, is a central actor. The task of the board is to provide general direction to and control of the organization, and to serve as the principal locus for accountability. In this model, the director general is responsible to the board for the operations of the agency. The director general is himself often a civil servant, although a number of political figures have also been appointed to these positions, bringing into question in some people(s minds the autonomous and depoliticized character of the agencies.

During the 1980s there was a shift towards greater involvement of the stakeholders in public policy areas in the boards of agencies, and "lay boards" became more common. This shift towards a more inclusive style of control structure for the director general also provoked some criticism, with the sense among critics that the agencies were becoming too responsive to their clients, and perhaps not enough to the general public interest. This debate continues, and the general model of the agency itself is under some reconsideration, with ministers often believing that they need more influence over the decisions being made as policies are implemented.

In this model of administration, the Minister and the ministry are not major players in the actual delivery of services, and constitutionally the ministerial level is forbidden to interfere in the administration of programs. That having been said, however, the formal separation of policy and administration implied in this model is difficult to maintain in practice. First, the budget process is an opportunity for ministers to influence administration. Further, in a small country with a relatively homogenous elite and a tradition of effective governance, cooperation among the various actors in a policy area is assumed as a part of the policy process. Finally, the boards develop, quite naturally, considerable expertise in their policy areas and are a crucial source of advice for the ministries when they prepare new policy. Indeed, the process of administering the policy often involves their making decisions that in effect make policy.

The Swedish model of administration is a clear attempt to separate policy and administration, similar to the idea that has been a cornerstone of Anglo-American theory of public administration (Flinders, 2004; Schultz and Maranto, 1998). By separating the two, however, this model also places the Minister in the difficult position of having his or her policies administered by organizations that may not agree with the Minister's priorities. The boards may even be opposed to policy changes that go against their established patterns of delivering policy, and perhaps even sabotage those changes. The Minister may have little means of controlling the agencies except through the budget process. In part for those reasons, the Swedish government is considering altering the role of the boards and perhaps creating implementation systems more integrated into the ministry (SOU, 2003).

When the British government attempted to copy this model of agencies from Sweden, it apparently could not accept the full independence of these organizations from the ministry. This lack of acceptance apparently was in part a function of the Westminster model of governing, in which ministers are assumed to be responsible (in principle) for everything that transpires in their department. That having been said, other autonomous organizations in British government have appointed boards with substantial responsibility for the conduct of their affairs (Skelcher, 1998) with minimal difficulties. The British model of the agency is an attempt to marry the Swedish model with the Westminster system of accountability, but this marriage has not necessarily been a happy one.

3.2.2 The Dutch Experience

Although not so deeply ingrained as in Sweden, the Netherlands also has extensive experience in using agencies and other forms of autonomous organizations to deliver public services. Rather than an attempt to limit royal prerogative, the Dutch experience has been built on concerns for efficiency, and the desire to involve interests from the society in the administration of public programs. In social welfare and education, the concern has been in part to involve religious communities, while in economic policy the concern has been with unions, employers and farmers.[9] Although largely autonomous, agencies were directly linked to the ministries, and the Minister was directly responsible for their actions.

During the 1980s and 1990s, the Dutch created a new class of organizations, called ZBOs, that were more distant from government and from ministerial authority. Some were organized under public law and some under private law, but all had a (long) arm's-length relationship with government, and many were self-financing. Most of the ZBOs had some form of stakeholder board, with a senior official responsible for day-to-day management. These boards, by virtue of being composed almost entirely of stakeholders did not have much detachment from the policy area and did not serve as effective checks on the actions of the organizations. In practice, these organizations were too removed from ministerial authority for comfort, and most have been either abolished or converted into more conventional agency structures with a more direct connection to the Minister. As might be expected, the major issue was the capacity of the Minister and Parliament to hold these organizations accountable for their actions (Van Thiel, 2003).

It must be noted here that both the Swedish and the Dutch experiences are in a context of ministerial responsibility that is substantially different from a Westminster system. Although Ministers, and the government as a whole, is responsible for actions, the individual civil servant or executive may be expected to have substantially more personal responsibility than in a Westminster system. Civil servants have been and continue to be more personally responsible for their actions and their decisions, and this fact is especially true when they are in more autonomous organizations and agencies, as in Sweden. That said, however, these cases do demonstrate alternatives for structuring autonomy.

3.2.3 Involvement of Social Partners

The discussion of the Swedish and Dutch experiences raises a more general point about the nature of boards for organizations such as the Crown corporations. The Swedish boards tend to be composed of experts in the policy field and to contain a significant number of representatives from social groups who benefit from, or are in other ways involved with, the organization in question. Some other countries moving to the agency model for implementation, for example, the Netherlands, have created boards composed almost entirely of representatives of those social partners, conceiving of this as a complement to traditional representative democracy in the control of programs delivering important public services.

The corporatist thinking inherent in the composition of boards from social partners is not widely accepted in Westminster political systems, which rely more heavily on representative institutions. Still, this format does raise the more general question of how best to constitute the boards for the Crown corporations. The report from the Treasury Board Secretariat spends a good deal of time on the training of board members—certainly a crucial element in improving their performance—but other than attempting to exclude civil servants has relatively little to say about the composition of the boards. It would seem that some attention should be given to developing criteria for the representativeness of boards, and even of means of selecting members that permitted greater involvement of the affected interests. Although this composition might create some conflicts among the affected interests, it could also be a means of enhancing democratic control.

The report from the Treasury Board Secretariat, and a good deal of other thinking about the structure of Crown corporations and analogous bodies, assumes that one form of structure is appropriate for all. That is almost certainly not the case, and one contribution to developing a model of accountability for these organizations is to consider what alternative may be available for composing the boards, and the relationships between the board and management. For example, a Crown corporation that has primarily economic responsibilities may be governed differently than one concerned with social policy issues or the arts.

3.3

Performance Management

Although implied in the reports from the Auditor General and the Treasury Board Secretariat, and certainly a mode of control that is increasingly important in Canada and in other industrialized democracies, performance management may be a crucial mechanism of accountability and control for the Crown corporations. Performance management is a managerial technique, but it also should be conceptualized as a means for enforcing accountability that can be especially important for autonomous organizations. For many Crown corporations, engaged as they are in economic activity, the assessment of performance may be somewhat less difficult than it is for many other organizations in the public sector (Hatry, 1999; Varone and Knoepfel, 1999). Profit and loss is not the only means of assessing the performance of these organizations, otherwise they probably would not be in the public sector, but their balance sheets are more important than those of public sector entities not clearly engaged in economic activity.

Of course, not all the Crown corporations are engaged in market-type activities, and the ones that do not appear to be operating in policy areas are among the most difficult to assess for performance management. For example, the Crown corporations that operate in the arts are in areas of human life in which there may be little agreement about the standards of evaluation. Artists may have very different ideas about success for these Crown corporations operating as funding organizations, and the general public may have another set of ideas about what constitutes adequate performance for any of these organizations. The resolution of this difficult task of measurement and evaluation will involve a political process, as well as some means of gaining a complete picture of what these organizations should do, and how well they are meeting public needs.

The economic dimension of performance is important for some Crown corporations, but the altogether murkier questions about the legality or appropriateness of actions are a less clear consideration of performance. Even if the economic performance of an organization is good and other performance targets are being reached, if other extra-legal activities are part of the activities being undertaken, then assessing performance becomes a less useful, or perhaps irrelevant mechanism for judging and enforcing accountability. Thus, performance management for public organizations may need to specify what should *not* be done, as well as what should be done, to be deemed to have performed well.

Leaving aside the difficulties of actually conducting effective performance management, the basic idea of using these techniques as a major, if not the major, mechanism for accountability is important. Performance management also represents a significant departure both from traditional forms of parliamentary accountability and from the composite measures of accountability recommended by the report of the Treasury Board Secretariat. Most traditional forms of accountability, because of their direct connection to politics and politicians, tended to focus on opportunities to embarrass a Minister before Parliament (Day and Klein, 1988). This politicization of accountability, in turn, often meant that the emphasis was on individual events and sometimes quite trivial events.[10] The politicization of performance in the case at hand is a crucial example of the dangers of focusing entirely on those modes of accountability for Crown corporations.

Using performance indicators as a fundamental mechanism for enforcing accountability tends to focus on average performance rather than on individual events. The question therefore becomes not, can we find an event that can embarrass a Minister? but, what has the organization been doing on average, day after day? Further, has performance this year or this month been better than during the previous time period? Changing the focus of accountability, using performance indicators does really depoliticize accountability as much as it makes the politics involved about effectiveness rather than about attempting to avoid errors. No organization, public or private, can perform without error, at least for any significant period of time, so the question is not so much, are there errors? But, how many errors are there? and what are managers (and their political masters) doing about them?

Improving the quality of public services is another virtue of utilizing performance as the principal focus for accountability in the public sector. Although absolute standards may be used to assess performance, in many ways the most important question in performance management is, is performance improving? The related questions are, of course, why is it improving, or if not, why is it not improving, and, how can managers move the organization and its programs forward. As some people have argued, New Public Management was about "*let* the managers manage," but performance is about "*make* the managers manage"; that is, performance targets and the drive for improvement can be powerful weapons for energizing public managers and making them think about ways of making the organization do its job better. In this approach accountability is less about punishing individuals and organizations for poor performance than it is about attempting to learn from the past and to improve.

Although the use of performance as a mechanism for accountability does have many virtues, there are also some problems. The central problem of conceptualizing performance in operational terms and developing indicators has already been mentioned. Further, performance may not focus enough at times on real failures, and it does not offer much help for political leaders, and citizens, facing the problems caused by many hands involved in delivering services. Things do go wrong, often in dramatic ways, and multiple actors will have had some role in the failures. While assigning blame may not solve the problem per se, it too can be a means of attempting to prevent future problems of the same sort. Although risk aversion is often condemned as a pathology in the public sector, it can be a useful means of preventing serious errors in governing.

Finally, not everything that we should expect from public organizations and their programs can be specified readily in a contract or in a business plan. In the case in point, all the things that an organization should *not* do are also difficult to specify and depend on judgment. This gap between expectations and reality is a particular problem when dealing with organizations that function at arm's length from the centre of government and therefore are not necessarily controlled directly by public officials. Some of the behaviour that is most important in social policy, in health care, or even in the arts is difficult to specify in a contract or in a business plan. In organizations that are directly tied to ministries the control and production of services can be controlled through supervision, or through the commitment of the public servants responsible for delivering the services directly to the "customers." On the other hand, if profit is a major goal for an organization then that hierarchy may be dysfunctional and competition is more effective in generating effective behaviours by managers and by the organization as a whole.

Some scholars suggest (see Zapico, 2000) that changes in accountability associated with the New Public Management have focused contract management more on evaluating poor economic performance, whereas traditional forms of accountability paid greater attention to avoiding malfeasance. Control agents (auditors, ministers, Parliament, the Treasury Board) have limited time and financial resources to exercise control, and therefore must choose to emphasize some aspects of accountability rather than others. The fact that apparent malfeasance on the part of the leadership of a Crown corporation could escape undetected for some time may reflect both the strengths and the weaknesses of performance management in the public sector.

4 The Public Interest

The issues raised above require some consideration of what is perhaps the most fundamental point about the use of agencies, Crown corporations, and other forms of delegated responsibility in government. Are these structures to be organizations concerned primarily with public service and the public interest, with strong public accountability structures in place from their inception, or are citizens to assume that the public interest will emerge if the organizations are as efficient and businesslike as possible? For the Crown corporations, the report prepared by the Treasury Board Secretariat appears to assume more of the latter, especially those corporations that are primarily commercial enterprises. The attempt to make their organization and performance very similar to private corporations is a clear indication of the priority given to efficiency and management in defining their mission.

The focus on efficiency for the Crown corporations appears to have been the longstanding means of assessing their performance,[11] but it also appears to have been accentuated as a part of the managerialist reforms of the public sector in Canada and elsewhere. While it is difficult to argue that public organizations, whether corporate or not in form, should be as efficient as possible, it is also difficult to argue that efficiency is the only value that should be pursued in the public sector. For example, is efficiency really the central value for arts organizations? Again, using a very similar organizational framework for organizations that are engaged in a range of different activities may not in the end produce the types of outcomes desired. Most citizens and practitioners in government would assume that strong and effective mechanisms for ensuring the public interest should be in place for both formulation and implementation of policy.

The public interest is also bound closely to the need to maintain the proper use of public authority for public purposes. That principle is easy to state in the abstract, but is more difficult to apply in specific cases. As already noted, legislation defining the scope of actions of Crown corporations could be used to specify the proper use of public authority for each organization. There is a limit to how far that legislation should go, if it is to maintain flexibility for organizations placed outside direct ministerial control. The most fundamental reason for that organizational format is to provide their managers the capacity to respond to opportunities and challenges more nimbly than can organizations in "mainstream government."

5 Conclusion

The accountability of public organizations, and of the individuals managing them, has always been a crucial question for democracy. With the decline of many other forms of democracy, such as the declining vote in elections, this connection between the public and the government is all the more important. The difficulty is that the complexity of contemporary government is reducing the clarity with which accountability can be exercised. Rather than a linear process of policy-making and implementation through public organizations, the use of the autonomous organizations, such as those serving as the focus of this paper, not to mention contracts, partnerships and other chains of interactions involved in delivering services, creates more complex chains of action.

These questions concerning accountability for organizations that operate at arm's length from government have arisen rather naturally for Crown corporations in Canada. These organizations are structured more or less as organizations in the private sector, but have complex control and accountability structures involving the Minister of the sponsoring department in government, as well as a board of directors. As the Treasury Board Secretariat report details, there is a dual pattern of control, and a good deal of ambiguity in the roles of both the Minister and the chief executive of the corporations.

Transparency is a central element of the accountability regimen that is being proposed for the Crown corporations. The fundamental assumption of the analysis of the current accountability situation of the Crown corporations is that, if many of the operations of these corporations, as well as the selection of the boards, were made more public, then these firms would operate more in the public interest and also perhaps more in line with the wishes of the Minister. Transparency is certainly key to any system of democratic accountability, but it may be too much to hope that simply airing problems will lead them to be solved. This lack of certainty about the role of transparency is perhaps especially true given the dual lines of control and accountability that exist in the current organizations of Crown corporations.

The other element on which control and accountability for the Crown corporations is well developed is auditing and financial controls. The emphasis on financial accountability has been in place for some time and appears effective. Financial accounting, however effective it may be at dealing with questions of the proper use of funds, cannot deal with other questions about the performance of these organizations and their exercise of the public trust. This is not an argument to minimize financial accountability of Crown corporations, but it is an argument that financial accountability is not sufficient. To some extent, the Auditor General has been developing performance auditing within Canadian Government, and there are good arguments for extending this practice more fully to the Crown corporations.

The Crown corporations have been, and continue to be, important actors in the delivery of public services for Canadians. That said, they and all other organizations in government, especially those operating with substantial statutory autonomy, must consider carefully how they are governed and held accountable. Certainly the work that has taken place by the Treasury Board Secretariat helps to clarify that accountability, but perhaps even greater work needs to be done to help these organizations reach higher standards of performance and of democratic accountability.

These issues of accountability for delivering public services have now become more difficult. To the relatively easier issues of fulfilling their mandates to deliver services of one sort or another has been added the more difficult political questions of ensuring that additional activities do not exceed the proper bounds of action by the public sector. These concerns require that the public sector reconsider the role of Ministers and perhaps especially the role of the boards. Further, opening the contracting process to external scrutiny, except when that openness may threaten commercial viability, may in itself be as important a means of control as many of the formal procedural controls that are typical in the public sector.

6 Recommendations

- *Increase the transparency of the contracting process through use of online monitoring. By making the content and amount of contracts more visible to control agents and to the attentive members of the public, abuse of this indirect and often hidden mechanism for governance can be limited.*

- *Include senior civil servants from sponsoring departments on the boards of Crown corporations.These public officials are more likely to be well-trained in issues of public accountability than are board members from outside government.*

- *Develop mechanisms for appointment to boards that are more transparent and that more closely resemble merit appointment processes in the civil service.*

- *Further clarify the relationships among the major players in accountability for the Crown corporations: the Minister, the board and the chief executive office.This clarification may entail clarification of terms such as "day-to-day operations."*

- *Consider alternative and enhanced parliamentary mechanisms for scrutiny of the Crown corporations.*

Endnotes

[1] This distinction is similar to the classic debate between Herman Finer and Carl Friedrich over control within the public sector. The former argued that control could be achieved through formal institutions of control, while the latter argued that no amount of formal control could be effective if individuals were not committed to democratic values.

[2] Although not formally constitutional, the "Armstrong Rules" in the United Kingdom have become the operative statements of the relationships between public servants and their Ministers.

[3] While these shifts are certainly important for Canada, they are even more significant in transitional countries in Asia and central and eastern Europe in which the civil service itself has not developed the values of probity and service characteristic of those in Europe and North America.

[4] At times an absence of direct public control is most welcomed by political leaders, who may not want to be perceived to be responsible for potentially offensive content of arts exhibits or the continuing failure of the trains to run on time.

[5] The OECD's study of agencies in a number of member countries detailed a large number of different control structures for agencies. Although some are almost certainly inappropriate for a Westminster government, they do provide a set of possibilities to consider.

[6] Even if Parliaments would accept the distinction, the media and the general public might not. The inability of British Ministers of Transport to distance themselves and the government from the failure of agencies responsible for rail safety in the face of accidents is indicative of that problem.

[7] One must say presumed here because the evidence from numerous corporate scandals over the past decade has been that boards appear to exercise relatively little real control over the actions of management.

[8] The commercial nature of some of the activities of Crown corporations may make putting all contracts on a public site before they are executed difficult, but means can be developed to make the content public within a reasonable time. This basic transparency could go a long way in deterring inappropriate contracts.

[9] The longest standing organizations of this type are the Water Boards, established to manage the continuing fight against flooding. These have become more representative over time, although still heavily influenced by technical considerations.

[10] This focus on errors is one of the causes of risk adverse behaviour of public officials, elected as well as permanent, that has been cited frequently as one of the negative features of public bureaucracy.

[11] Examining earlier reports from the Treasury Board and the Auditor General on the management of the Crown corporations indicates that the principal focus for control has been the concern for fiscal efficiency rather than whether or not the organizations were necessarily operating in the public interest.

References

Algemene Rekenkamer. 2002. Systemen van checks and balances bij rechtspersonen met een wettelijke taak. Achtergrondstudie bij het onderzoek Verantwoording en toezicht bij rechtspersonen met een wettelijke taak, deel 3c. Den Haag: Algemene Rekenkamer.

Ashley, C.A., and R.G.H. Smails. 1965. *Canadian Crown Corporations: Some Aspects of Their Administration and Control*. Toronto: Macmillan of Canada.

Aucoin, P., and M. Jarvis. 2005. *Modernizing Government Accountability: A Framework for Reform*. Ottawa: Canada School of Public Service.

Bovens, M.A.P. 1998. *The Quest for Responsibility*. Cambridge: Cambridge University Press.

Day, P., and R. Klein. 1988. *Accountabilities*. London: Tavistock.

Fyfe, T., and T. Fitzpatrick. 2002. "Canada." In Organization for Economic Cooperation and Development, *Distributed Public Governance: Agencies, Authorities and Other Government Bodies*. Paris: OECD.

Flinders, M. 2004. "Icebergs and MPs: Delegated Governance and Parliament." *Parliamentary Affairs*, 57: 767-84.

Gregory, R. 1998. "Political Responsibility for Bureaucratic Incompetence." *Public Administration*, 73: 519-38

Hatry, H. 1999. *Performance Measurement: Getting Results*. Washington, DC: The Urban Institute.

Hood, C., C. Scott, O. James, G. Jones and T. Travers. 1999. *Regulation inside Government*. Oxford: Oxford University Press.

Hood, C., O. James, B.G. Peters and C. Scott. 2004. *Controlling Modern Government*. Cheltenham: Edward Elgar.

Kearns, K. 2003. "Accountability in a Seamless Economy." In B.G. Peters and J. Pierre, eds., *Handbook of Public Administration*. London: Sage.

Klijn, E.-H. 1996. "Analyzing and Managing Policy Processes in Complex Networks." *Administration and Society*, 28: 90-119.

Knoepfel, P., and F. Varone. 1999. "Mesurer la performance publique: méefions-nous des terribles simplificateurs." *Politiques et management publique*, 17: 123-145.

Larkin, R. 2002. "Distributed Public Governance: Principles for Control and Accountability of Agencies, Authorities and other Government Bodies" In Organization for Economic Cooperation and Development, *Distributed Public Governance: Agencies, Authorities and Other Government Bodies*. Paris: OECD.

Meyers, M.K., and S. Vorsanger. 2003. "Street Level Bureaucrats and the Implementation of Public Policy ." In B.G. Peters and J. Pierre, eds., *Handbook of Public Administration*. London: Sage.

Mountfield, R. 2001. Oral Evidence to Committee on Public Administration, House of Commons

Mulgan, R. 2000. "Accountability: An Ever Expanding Concept." *Public Administration*. 78: 555-74.

Niskanen, W. 1971. *Bureaucracy and Representative Government*. Chicago: Aldine/Atherton.

Nye, J.S., D. King and P.D. Zelikow. 1999. *Why Citizens Don't Trust Government*. Washington, DC: The Brookings Institution.

Organization for Economic Cooperation and Development. 2002. *Distributed Public Governance: Agencies, Authorities and Other Government Bodies*. Paris: OECD.

Peters, B.G. Forthcoming. *The Quest for Coordination: Horizontal Management in Contemporary Government*. Lawrence: University Press of Kansas.

Polidano, C. 1999. "The Bureaucrat Who Fell under a Bus: Ministerial Responsibility, Executive Agencies, and the Derek Lewis Affair in Britain." *Governance*, 12: 201-29.

Pollitt, C., and G. Bouckaert. 2004. *Public Management Reform*. 2nd ed., Oxford: Oxford University Press.

Pollitt, C., C. Talbot, J. Caulfield and A. Smullen. 2004. *Agencies: How Governments Do Things through Semi-Autonomous Agencies*. Basingstoke: Macmillan.

Power, M. 1997. *The Audit Society: Rituals of Verification*. Oxford: Oxford University Press.

Pharr, S., and R.D. Putnam. 2000. *Disaffected Democracies: What's Troubling the Trilateral Countries*. Princeton, NJ: Princeton University Press.

Scharpf, F.W. 1988. "The Joint Decision Trap: Lessons from German Federalism and European Integration." *Public Administration*, 66: 239-78.

Schick, A. 1996. *The Spirit of Reform*. Wellington: State Services Commission.

Schultz, D., and R. Maranto. 1998. *The Politics of Civil Service Reform*. New York: Peter Lang.

Skelcher, C. 1998. *The Appointed State: Quasi-Governmental Organizations and Democracy*. Buckingham: Open University Press.

Smith, B.L.R., and D.C. Hague. 1971. *The Dilemma of Accountability in Modern Government*. London: Macmillan.

Sorenson, E., and J. Torfing. 2003. "Network Politics, Political Capital and Democracy." *International Journal of Public Administration*, 26: 609–34.

SOU. 2003.13 Utvecklingskraft for Hallbar Valfard (Development for Sustainable Welfare). Stockholm.

Thomas, P. 2003. "Introduction to Accountability Section." In B.G. Peters and J. Pierre, eds., *Handbook of Public Administration*. London: Sage.

Treasury Board Secretariat. 2005. *Canada's Crown Corporations: Meeting the Expectation of Citizens*. Ottawa: Treasury Board Secretariat.

Van Thiel, S. 2003. "Quangos in Dutch Government." In C. Pollitt and C. Talbot, eds., *Unbundled Government: A Critical Analysis of the Global Trend to Agencies, Quangos and Contractualisation*. London: Routledge.

Zapico, E. 2000. "Strategic Spending Management: A New Role for the Budget Centre." In Y. Fortin and H. Van Hassel, eds., *Contracting in the New Public Management*. Amsterdam: IOS Press.

APPENDIX A:
LIST OF AUTHORS

Director of Research

Donald Savoie

Professor of Public Administration, Université de Moncton

Research Studies

Stan Corbett

Continuing Adjunct, Faculty of Law, Queen's University

Ministerial Responsibility and the Financial Administration Act: The Constitutional Obligation to Account for Government Spending

C.E.S. (Ned) Franks

Professor Emeritus, Political Studies, Queen's University

The Respective Responsibilities and Accountabilities of Ministers and Public Servants: A Study of the British Accounting Officer System and Its Relevance for Canada

James Ross Hurley

Former Constitutional Advisor, Government of Canada

Responsibility, Accountability and the Role of Deputy Ministers in the Government of Canada

B. Guy Peters

Maurice Falk Professor of American Government,
University of Pittsburgh

Public Accountability of Autonomous Public Organizations

S.L. Sutherland

Visiting Professor in the Public Administration Program of the School of Political Studies, University of Ottawa

The Role of The Clerk of the Privy Council

Commission of Inquiry
into the
Sponsorship Program
& Advertising Activities